THE DIALOGUE IN ENGLISH;

Between

A Doctor of Divinity,

And a

Student in the Laws of *ENGLAND.*

Newly corrected and Imprinted with new Additions.

London,
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The firſt Dialogue in Engliſh betwixt *a Doctor of Divinity* and *a Student in the Laws of England*, of the grounds of the ſaid Laws, and of conſcience, newly corrected and eſtſoones imprinted with new Additions.

§ *The Introduction.*

A Doctor of Divinity that was of great acquaintance and familiarity with a Student in the Laws of England ſaid thus unto him: I have had great deſire of long time to know wherupon the law of England is grounded: but becauſe the moſt part of the Law of England is written in the French Tongue, therfore I cannot through my owne ſtudy attain to the knowledge therof: for in that Tongue I am nothing expert. And becauſe I have found thee a faithful friend to me, in all my buſineſs, therfore I am bold to come to thee before any other to know thy mind, what be the very grounds of the law of England as thou thinkeſt.

Stu. That would aske a great leiſure, and it is alſo above my cunning to doe it. Nevertheleſſe, that thou ſhalt not think that I would wilfully re-

fuse to fulfill thy desire, I shall with good will do that in me is to satisfie thy mind: But I pray thee that thou wilt, first shew me somewhat of other Lawes that pertaine most to this matter, and that Doctors treat of, how laws have begun. And then I will gladly shew thee as me thinketh what be the grounds of the law of England. D I will with good will do as thou saist: Wherfore thou shalt understand that Doctors treat of four laws, the which as (me seemeth) pertaine most to this matter. The first is the law eternall. The 2. is the law of Nature of reasonable creatures, the which as I have heard say, is called by them that be learned in the law of England, the law of reason. The 3. is the law of God. The 4. is the law of Man. And therefore I will first treat of the law Eternall.

Of the law Eternall.

Chap. 1.

LIke as there is in every artificer a reason of such like things as are to be made by his craft: so likewise it behoveth that in every governor there be reason & forsight in the governing of such things as shall bee ordred & done by him, to them that he hath the governance of. And forasmuch as Almighty God is the creator and maker of all creatures, to the which he is compared as a workman to his workes: and is also the governor of all deeds and movings that be found in any creature: Therefore as the reason of the wisedome of GOD (inasmuch as creatures be created by him) is the reason and forsight

ſight of all crafts and workes that have been or ſhall be, ſo the reaſon of the Wiſdome of God moving all things by wiſdome made to a good end, obtaineth the name and reaſon of a law, and that is called the law eternall.

And this law eternall is called the firſt law, and it is well called the firſt, for it was before al other lawes, and all other lawes be derived of it: whereupon Saint Auguſtine ſaith in his 1. Booke of Free Acoxtrement, that in Temporall Lawes nothing is righteous ne lawfull, but that the people have derived to them out of the Law eternall Wherefore every man hath right & title to have that he hath righteouſly of the right wiſe judgement of the firſt reaſon which is the law eternal Su. But how may this law eternall be knowne? for as the Apoſtle writeth in the 5. chapter of his firſt Epiſtle to the Corinthians, Quæ ſunt Dei nemo ſcit niſi ſpiritus Dei. That is to ſay, No man knoweth what is in God but the ſpirit of God Wherefore it ſeemeth that hee openeth his mouth againſt heaven that attempteth to know it. Dict. This Law eternall no man may know as it is in it ſelfe, but onely bleſſed ſoules that ſee God face to face. But almighty God of his goodneſſe sheweth of it as much to his creatures as is neceſſary for them, for els God ſhould bind his creatures to a thing impoſſible: which may in no wiſe bee thought in him. Therefore it is to be underſtood, that 3. manner of waies almighty God maketh this law eternall knowne to his creatures reaſonable. Firſt, by the light of naturall reaſon. Secondly, by heavenly revelation. Thirdly, by the order of a

Prince or any other secundary governor that hath power to bind his subjects to a law.

And when the law eternal or the will of God is knowen to his creatures reasonable by the light of naturall understanding, or by the light of naturall reason, that is called the law of reason: and when it is shewed by heavenly revelation in such manner as hereafter shall appear, then it is called the law of God And when it is shewed unto him by the order of a Prince, or of any other secundary governor, that hath a power to set a Law upon the Subjects, then it is called the Law of man, though originally it bee made of God. For laws made by man that hath received thereto power of God, be made by God. Therefore the said three Laws, that is to say, the law of reason, the law of God, and the law of man the which have several names after the manner as they be shewed to man, be called in God, one law eternall.

And this is the law of which it is written, Proverbiorum octavo, where it is said, Per me reges regnant, & legum conditores justa discernunt. That is to say, by me Kings raigne and makers of laws discerne the truth: and this sufficeth for this time for the law eternall.

§ Of the law of reason, the which by Doctors is called the law of nature of reasonable creatures.

Chap. 2.

First is is to be understood, that the law of nature, may be considered in two maners that

that is to say, generally and specially; when it is considered generally, then it is referred to all creatures, as well reasonable as unreasonable, for all unreasonable creatures live under a certaine rule to them given by nature necessary for them to the conservation of their being, but of this law it is not our intent to treat at this time. The law of nature specially considered: which is also called the Law of reason, pertaineth onely to creatures reasonable, that is, man, which is created to the image of God.

And this Law ought to be kept as well among Jewes and Gentiles, as among Christian men, and this Law is alway good and righteous, stirring and inclining a man to good, and abhorring evill. And as to the ordring of the deeds of man it is preferred before the Law of God, and it is written in the heart of every man teaching him what is to bee done, and what is to bee fled: and because it is written in the heart, therefore it may not bee put away, ne it is never changeable by no diversity of place ne time: and therefore against this Law, prescription, statute nor custome might not prevaile, and if any be brought in against it, they bee not prescriptions, statutes, nor customes, but things void and against Justice, and all other Lawes: as well the Lawes of God, as to the acts of men, as other, be grounded thereupon.

Stu. Sith the Law of reason is written in the heart of every man, as thou hast said before, teaching him what is to be done, and what is to

be fled, and the which thou saist may never bee put out of their heart, what needeth it then to have any other law brought in, to order the acts and deeds of the people?

Do. Though the law of reason may not bee changed nor wholly put away; Nevertheless before the Law written, it was greatly let and blinded by evill customes, and by many sins of the people besides our originall sin. Insomuch that it might hardly be discerned what was righteous & what unrighteous, and what was good, and what evill. Wherefore it is necessary for the good order of the people, to have many things added to the law of reason, aswell by the Church as by secular Princes, according to the manners of the Countrey and of the people, where such additions should be exercised. And this law of reason differeth from the law of God in two manners. For the law of God is given by revelation of God, and this law is given by a naturall light of understanding. And also the law of God ordereth a man of it selfe by a nigh way to the felicity that ever shall endure. And the law of reason ordereth a man to the felicity of this life.

Stu. But what be the things that the law of reason teacheth to be done, and what to be fled, I pray thee shew me?

Doct. The law of reason teacheth that good is to be loved, and evill is to be fled. Also that thou shalt do to another that thou wouldst another should doe to thee. And that we may doe nothing against truth. And that a man must live peaceably with other. That Iu-

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stice is to be done to every man, and also that wrong is not to be done to any man.

And that also a trespasser is worthy to bee punished, and such other: of the which follow divers other secundary commandments, the which be as necessary conclusions, derived of the first. As of that commandment that good is to be beloved, it followeth that a man shall love his benefactor: for a benefactor in that he is a benefactour, includeth in him a reason of goodnesse, or else he ought not to be called a benefactour, that is to say a good doer, but an evill doer. And so in that hee is a benefactour, he is to be beloved in all times and in all places. And this Law also suffereth many things to be done, as that it is lawfull to be put away force with force And that it is lawfull for every man to defend himselfe and his goods against an unlawfull power. And this law runneth with every mans law, and also with the law of God as to the deeds of man. and must be alwaies kept and observed. and shall alway declare what ought to follow upon the generall rules of the law of man, and shall restraine them if they be any thing contrary unto it

And here it is to be understood. that, after some men, the law whereby all things were in common, was never of the Law of Reason, but onely in the time of extreame necessity. For they say that the law of Reason may not bee changed, but they say it is evident that the law whereby all things should be in common, is changed, Wherefore these con=

conclude that was never the law of Reason.

§ Of the Law of God.

Chap. 3.

The Law of God is a certain law given by revelation to a reasonable creature, shewing him the will of God, willing that creatures reasonable be bound to do a thing, or not doe it, for obtaining of the felicity eternall And it is said for the obtaining of the felicity eternall, to exclude the laws shewed by revelation of God for the politicall rule of the people, the which be called Judicials for a law is not properly called the law of God, because it was shewed by revelation of God, but also because it directed a man by the nearest way to the felicity eternall as been the laws of the old Testament, that been called Mozals, and the Laws of the Evangelists, the which were shewed in much more excellent manner, then the law of the old Testament was: for that was shewed by the mediation of an Angell: But the law of the Evangelists, was shewed by the mediation of our Lord Jesu Christ God and man and the law of God is alway righteous & just, for it is made and given after the will of God And therfore all acts and deeds of man be called righteous and just, when they be done according to the Law of God and bee conformable to it Also some time a Law made by man is called the

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law of God: As when a law taketh his principall ground upon the Law of God, and is made for the declaration or conservation of the faith, and to put away Heresies, as divers Lawes Canon, and also divers Lawes made by the common people sometime do. The which therefore are rather to bee called the Law of God, then the law of man. Yet nevertheless, all the Lawes Canon bee not the Lawes of God: for many of them be made onely for the politicall rule and conservation of the people. Whereupon John Gerson in the Treatise of the Spirituall life of the soule, the second lesson, and the third Corollary, saith thus: All the Canons of Bishops nor their decrees bee not the law of God: For many of them bee made onely for the politicall conservation of the people. And if any man will say, Be not all the goods of the Church spirituall, for they belong unto the spirituality, and lead to the spiritualty? Wee answer, That in the whole politicall conservation of the people, there bee some specially deputed and dedicated to the service of God, the which most specially (as by an excellency) are called spirituall men, as religious men are. And other though they walke in the way of God, yet nevertheless, because their office is most specially to bee occupied about such things as pertaine to the Common-wealth, and to the good order of the people, they bee therefore called secular men or lay men. Nevertheless, the goods of the first may no more bee called Spirituall, then the goods of the other, for they be things meere tem-

temporall, and keeping the body as they doe in the other. And by the like reason lawes made for the politicall order of the Church be called many times spirituall or the lawes of God: Neverthelesse, it is but unproperly. And other be called civill or the lawes of man. And in this point many be oft times deceived, and also deceive other, the which judge the things to be spirituall, the which all men know be things temporal and carnall. These be the words of John Gerson in the place alledged before. Furthermore beside the law of reason, and the law of man, it was necessary to have the law of God, for four reasons.

The first, because man is ordained to the end of the eternall felicity, the which exceedeth the proportion and faculty of mans power. Therefore it was necessary that beside the law of reason, and the law of man, he should be directed to his end by a law of God.

Secondly forasmuch as for the uncertainty of mans judgement specially of things peculiar and seldome falling, it happened oft times to follow divers judgements of divers men and diversities of lawes and therefore to the intent that a man without any doubt may know what hee should do, and what he should not do: It was necessary that he should be directed in all his deeds by a law heavenly given by God, the which is so apparent, that no man may swerve from it, as is the law of God.

Thirdly, man may onely make a law of such things as he may judge upon, and the judgement of man may not be of inward things, but onely

onely of outward things; and nevertheleſſe it belongeth to perfection that a man be well ordred in both, that is to ſay, alſwell inward as outward. Therefore it was neceſſary to have the Law of GOD, the which ſhould order a man alſwell of inward things, as of outward things.

The fourth is, becauſe as Saint Auguſtine ſaith in the firſt booke of free Arbitrement, the law of man may not puniſh al offences: for if all offences ſhould be puniſhed the Commonwealth ſhould be hurt, as is of contracts. For it cannot be avoided, but that aslong as contracts be ſuffered, many offences ſhall follow thereby, and yet they be ſuffered for the commonwealth: And therefore that no evill ſhould be unpuniſhed, it was neceſſary to have the Law of God that ſhould leave no evill unpuniſhed.

§ Of the Law of man.

Chap. 4.

THe law of man (the which ſometime is called the Law poſitive) is derived by reaſon as a thing which is neceſſary, and probably following of the law of reaſon, and of the law of God. And that is called probable in that it appeareth to many, and ſpecially to wiſe men to be true. And therefore in every law poſitive well made, is ſomewhat of the Law of reaſon, and of the law of God. And to diſcerne the law of God & the law of reaſon from the law poſitive is very hard. And though it be hard, yet it is much

much necessary in every morall doctrine, and in all Lawes made for the Common wealth. And that the law of man bee just and rightwise, two things be necessary, that is to say: wisedome and authority. Wisedome, that hee may judge after reason what is to be done for the Commonalty, and what is expedient for a peaceable conversation and necessary sustentation of them. Authority, that he have authority to make Lawes, For the Law is derived of Ligare, that is to say, to bind. But the sentence of a wise man doth not bind the commonalty, if he have no rule over them. Also to every good Law be required these properties, that is to say, that it be honest, rightwise, possible in it selfe, and after the custome of the countrey, convenient for the place and time, necessary, profitable, and also manifest, that it be not captious by any darke sentences, ne mixt with any private wealth, but all made for the Common-wealth. And after Saint Bridget in the 4 Book in the hundred twenty ninth Chapter, Every good law is ordained to the health of the soul, and to the fulfilling of the Lawes of God, and to induce the people to flie evill desires and to do good workes. Also the Cardinall of Cameracer, writeth, whatsoever is righteous in the Law of Man, is righteous in the law of God. For every mans Law must be consonant to the Law of God And therefore the Lawes of Princes, the commandements of Prelates, the Statutes and Commonalties, ne yet the Ordinance of the Church is not righteous nor obligatory, but it be consonant to the law of God.

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And of such a Law of man that is consonant to the Law of God, it appeareth who hath right to Lands and goods, and who not: For whatsoever a man hath by such Lawes of man, hee hath righteously. And whatsoever hee hath against such Lawes, is unrighteously had.

For Laws of man not contrary to the Law of God, nor to the Law of reason, must be observed in the law of the soule: and hee that despiseth them, despiseth God, and resisteth God. And furthermore, as Gratian saith, because evill men feare to offend for feare of pain: Therefore it was necessary that divers paines should be ordained for divers offences, as Physitians ordained divers remedies for severall diseases. And such paines be ordained by the makers of Lawes, after the necessity of the time, and after the disposition of the people. And though that law that ordained such paines hath thereby a conformity to the law of God, for the Law of God commandeth that the people shall take away evill from amongst themselves) yet they belong not so much to the Law of GOD, but that other paines (standing the first principles) might bee ordained and appointed therefore, that is the law that is called most properly the Law Positive, and the law of man.

And the Philosopher said in the third book of his Ethicks, that the intent of a maker of a law is to make the people good, and to bring them to vertue. And although I have somewhat in a generall shewed thee whereupon the Law of Eng-

England is grounded (for of neceſſity it muſt be grounded of the ſaid lawes, that is to ſay, of the Law Eternall, of the Law of Reaſon, and of the Law of God) Nevertheleſſe, I pray thee ſhew me more ſpecially whereupon it is grounded as thou thinkeſt, as thou before haſt promiſed to do.

Stu. I will with good will doe therein that lyeth in mee; for thou haſt ſhewed mee a right, plaine, and ſtraight way thereto. Therefore thou ſhalt underſtand, that the Law of England is grounded upon ſix principle grounds. Firſt, it is grounded on the Law of Reaſon. Secondly, on the Law of God. Thirdly, on divers generall Cuſtomes of the Realme. Fourthly, on divers Principles that be called Maximes. Fiftly, on divers particular Cuſtomes. Sixtly, on divers Statutes made in Parliaments by the King, and by the Common Councell of the Realme. Of which grounds I ſhall ſpeak by order as they be rehearſed before. And firſt of the Law of Reaſon.

Of the firſt ground of the law of England.

Chap. 5.

THe firſt ground of the law of England is the Law of Reaſon, whereof thou haſt treated before in the 2. Chapter, the which is kept in this Realme, as it is in all other Realms, and as of neceſſity it muſt needs be (as thou haſt ſaid before) D. But I would know what is called the law of Nature after the laws of

of England. S. It is not used among them that be learned in the Lawes of England to reason what thing is commanded or prohibited by the law of nature & what not, but all the reasoning in that behalfe is under this manner. As when any thing is grounded upon the law of nature, they say, that reason will that such a thing done, and if it be prohibited by the law of nature they say it is against reason, or that reason will not suffer that to be done. D. Then I pray thee shew me what they that be learned in the laws of the realm hold to be commanded or prohibited by the law of nature under such termes and after such manner as is used among them that be learned in the said laws.

S. There be put by them that be learned in the Lawes of England two degrees of the Law of Reason, that is to say, the Law of reason primary, & the Law of reason secondary: by the law of reason primary be prohibited in the Lawes of England, murder, (that is, the death of him that is innocent) perjury, deceit, breaking of the peace, and many other like. And by the same law also it is lawfull for a man to defend himselfe against an unjust power, so he keep due circumstance. And also, if any promise be made by man, as to the body, it is by the law of reason void in the laws of England. The other is called the law of secundary reason, the which is divided into two branches, that is to say, into the Law of secundary reason generall, and into a Law of secundary reason particular. The law of a secundary reason generall, is grounded and derived of the generall Law, or generall

cuſtome of property, whereby goods movable and unmovable be brought into a certaine property, ſo that every man may know his owne thing. And by this branch bee prohibited in the Lawes of England diſſeiſins, treſpaſſe in lands and goods reteuſe, theft, unlawfull withholding of another mans goods, and ſuch other. And by the ſame law it is a ground in the law of England, that ſatisfaction muſt be made for a treſpaſſe, and that reſtitution muſt bee made of ſuch goods as one man hath that belong to another man, the debts muſt be paid, covenants fulfilled, and ſuch other. And becauſe diſſeiſins, treſpaſſe in lands and goods, theft, and other had not been known, if the law of property had not been ordained: therefore all things that be derived by reaſon out of the ſaid law of property, be called the law of reaſon ſecundary generall for the law of property is generally kept in all Countries

The law of reaſon ſecundary particular, is the law that is derived upon divers Cuſtomes generall and particular, and divers Maximes and Statutes ordained in this realm, and it is called the law of reaſon ſecundary particular, becauſe the reaſon in that caſe is derived of ſuch a law that is only holden for law in this realm, and in none other realm.

Doct. I pray thee ſhew me ſome ſpecially caſe of ſuch a law of Reaſon ſecundary particular for an example. S. There is a law in England, which is law of cuſtome, that if a man take a diſtreſſe lawfully, that he ſhall put it pound overt, there to remaine till hee be ſatisfied

fied of that he distrained for. And then thereupon may be asked this question. That if the beasts dye in pound for lack of meat, at whose perill die they, whether die they at the perill of him that distrained or of him that owed the beasts? D. If the law be as thou saist, and that a man for a just cause taketh a distresse, and putteth into a pound overt, and no law compelleth him that distraineth to give them meat, then it seemeth of reason that if the distresse die in pound for lack of meat that it died at the perill of him that oweth the beasts & not of him that distrained, for in him that distrained there can be assigned no default, but in the other may be assigned a default, because the rent was unpaied. S. Thou hast given a true judgment, & who hath taught thee to do so but reason derived of the said generall customs? And the law is so full of such secundary reasons derived out of the general Customs and Maximes of the realm, that some men have affirmed that all the law of the realm is the law of reason. But that cannot be proved as me seemeth, as I have partly shewed before and more fully will shew after. And it is not much used in the laws of England, to reason what law is grounded upon the law of the first reason primary. or on the law of reason secundary, for they be most commonly open'y known of themselves, but for the knowledge of the law of reason secundary is greater difficulty and therefore therein dependeth much the manner and form of arguments in the laws of England.

And it is to be noted that all the deriving of Reason in the Law of England proceedeth of the first principles of the Law, or of something that is derived of them: and therefore no man may right wisely judge, ne groundly reason in the laws of England, if he be ignorant in the first principles. Also all birds, fowles, wild beasts of Forrests, & Warren and such other be excepted by the laws of England out of the said generall law and custome of property. For by the laws of the realme, no property may be of them in any person, unless they be tame. Nevertheless the egs of Hawks, Herons, or such other as build in the ground of any person be adjudged by the said laws to belong to him that oweth the ground.

Of the second ground of the Law of England.

Chap. 6.

The second ground of the Law of England is the Law of God, and therefore for punishment of them that offend against the Law of God, it is enquired in many Courts in this Realme, if any hold any opinion secretly or in any other manner against the true Catholike Faith: and also if any generall custome were directly against the law of God, or if any statute were made directly against it: as it were ordained that no alms should be given for no necessity, the custome or statute were void. Nevertheless the statute made in the 34. yeare of King Ed. 3. whereby it is ordained that no man under paine of imprisonment shall give any almes to

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any valiant beggars that may well labor. that they may so be compelled to labor for their living. is a good statute, for it observeth the intent of the Law of God And also by authority of this law, there is a ground in the Laws of England, that he that is Accursed shall maintain no action in the Kings Court, except it be in very few cases, so that the same excommunication be certified before the Kings justices in such manner as the Law of the Realm hath appointed: and by the authority also of this ground, the Law of England admitteth the spirituall jurisdiction of Dismes and Offerings, and of all other things that of right belong unto it, and receiveth also all laws of the Church duely made, and that exceed not the power of them that made them Insomuch that in many cases it behoveth the Kings Justice to judge after the Laws of the Church.

D. How may that be, that the Kings Justices should judge in the Kings Courts after the law of the Church? for it seemeth that the Church should rather give judgement in such things as it may make laws of, then the Kings Justices.

St. That may be done in many cases, whereof I shall for example put this case. If a writ of right of ward bee brought of the body, &c. and the tenant confessing the tenure, & the nonage of the infant saith that the infant was married in his ancestors dayes, &c. whereupon 12. men be sworn, which give this verdict, that the infant was married in the life of his ancestors, and that the woman in the life of his ancestor sued a divorce, whereupon sentence was given that they should be divorced, and that the

heire appealed, which hangeth yet undecided, praying the aid of the Justice to know whether the infant in this case shall be said married or no. In this case if the law of the Church be that the said sentence of Divorce standeth in his strength and vertue until it be annulled upon the said appeal: That the infant at the death of his ancestor was unmarried because the first marriage was annulled by that divorce: and if the law of the church be, that the sentence of the divorce standeth not in effect till it bee affirmed upon the said appeale, then is the infant yet married. so that the value of his marriage cannot belong unto the Lord, and therefore in this case judgement conditional shall be given &c. and in like wise the Kings Justices in many other cases shall judge after the law of the Church, like as the spirituall Judges must in many cases form their judgement after the Kings laws.

D. How may that be that the spirituall Judges should judge after the Kings laws? I pray thee shew me some certaine cases thereof. S. Though it be somewhat a digression from our first purpose, yet I will not withsay thy desire, but will with good will put thee a case or two thereof, that thou maist the better perceive what I meane. If A. and B. have goods joyntly and A. by his last will bequeath his portion therein to C. and maketh the said B. his Executor and dyeth and C. agreeth the execution of this will in the spirituall court: in this case the judges there be bound to judge that will to be void, because it is void by the laws of this Realme, and likewise if a man be outlawed, and after

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by his will bequeath certaine goods to John at Stile, & make his executors and dye, the King seiseth his goods, and after giveth them again to the executors & after J. at Stile sueth a citation out of the spirituall court against the executors, to have execution of the will: in this case the Judges of the spirituall Court must judge the will to be void. as the law of the realme is that it is, and yet there is no such law of forfeiture of good by outlawry in the spiritual law.

Of the third ground of the law of England. Chap. 7.

THE third ground of the law of England standeth upon divers generall Customes, of old time used through all the realme, which have been accepted and approved by our Soveraign Lord the K. and his progenitors, and all his subjects: & because the said customs be neither against the Law of God, nor the Law of reason, and have been alway taken to be good and necessary for the commonwealth of all the Realme: Therefore they have obtained the strength of the Law, insomuch that he that doth against them doth against Justice: and these be the customs that properly be called the Common Law: and it shall alway be determined by the Justices whether there be any such generall customs or not, and not by 12 men: and of these generall customes, and of certain principles that be called Maximes, which also take effect by the old custome of the realme (as shall appeare in the Chapter next following) depeneth most part of the Law of this Realme.

And therefore our Soveraign Lord the King at his Coronation among other things taketh a solemn oath, that hee shall cause all the customs of his realme faithfully to be observed. Do. I pray thee shew mee some of these generall customes. S. I will with good will, and first I shal shew thee how the customs of the realme is the very ground of divers Courts in the Realme, that is to say, of the Chauncery, of the Kings bench, of the Common pleas, and the Exchequer, the which be Courts of Record, because none may sit as Judges in these Courts but by the Kings letters patents. And these Courts have divers authorities, whereof it is not to treat at this time. Other Courts there be also onely grounded by the custom of realme, that bee of much lesse authority then the Courts before rehearsed. As in every shire within the realm there is a court that is called the county, and another that is called the sheriffs Coyn, and in every manoy is a court that is called a court Baron, and to every faire and market is incident a Court that is called a Court of Pipowders. And though in some statute is made mention sometime of the said Courts, yet nevertheless of the first institution of the said courts, and that such Courts should be, there is no statute nor law written in the Laws of England. And so all the ground and beginning of the said courts depend upon the custom of the realm, the which customs is of so high authority, that the said Courts, ne their authorities may not be altered, ne their names changed without Parliament.

Also,

Also, by the old custome of the realm no man shall be taken, imprisoned, disseised, nor otherwise destroyed, but he be put to answer by the law of the land: and this custome is confirmed by the statute of Magna Charta chap. 26.

Also, by the old custom of the Realm, all men great and small shall doe and receive justice in the Kings Courts, and this custom is confirmed by the statute of Marlb. chap. 1.

Also, by the old custom of the realm, the eldest son is only heir to his ancestor, and if there be no sons but daughters, then all the daughters shall be heires. And so it is of sisters & other kinswomen. And if there be neither son, daughter, brother, nor sister, then shall the inheritance descend to the next kinsman or kinswoman of the whole bloud to him that had the inheritance, of how many degrees soever they be from him. And if there be no heire generall nor speciall, then the land shall escheat to the Lord of whom the land is holden.

Also, by the old custome of the Realm, lands shall never ascend or descend from the son to the father or mother, nor to any other ancestor in the right line, but it shall rather escheat to the Lord of the fee.

Also, if any alien have a son that is an alien, and after is made Denizen, and hath an other son, and after purchaseth lands and dyeth, the youngest son shall inherit as heir, and not the eldest.

Also, if there be three brethren, and the middest brother purchase Lands and dyeth without heire of his body, the eldest brother shall inherit as

as heire to him and not the younger brother.

And if land in fee simple descend to a man by the part of his father, and he dieth without heir of his body, then the inheritance shall descend to the next heire of the part of his father. And if there bee no such heire of the part of his father, then if the father purchaseth the lands, it shal go to the next heire of the fathers mother, & not to the next heir of the sons mother, but it shal rather escheat to the Lord of the fee. But if a man purchase lands to him and to his heirs, & die without heir of his body, as is said before. then the land shall descend to the next heire of the part of his father, and if there be any, and if not then to the next heir of the part of his mother,

Also the son purchaseth lands in fee, and dieth without heir of his body, the land shall descend to his uncle and shall not ascend to his father: But if the father have a son, though it be many years after the death of the elder brother, yet that son shall put out his uncle, and shall enjoy the Land as heir to the elder brother for ever.

Also by the custom of the realm, the child that is born before espousals is Bastard, and shall not inherit.

Also, the custom of the realm is that no maner of goods nor chattels real nor personal shall never go to the heir. but to the executors, or to the Ordinary, or Administrators.

Also, the husband shall have all the chattels personals that his wife had at the time of the espousals or after, and also chattels reall if hee overlive his wife: But if he sell or give away

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the chattels reall and die by that sale and gift the interest of the wife is determined, or else they shall remain to the wife, if she overlive her husband: also the husband shall have all the inheritance of his wife, whereof he was seised indeed in the right of his wife during the espousals in fee, or in fee taile generall for terme of life, if he have any childe by her, to hold as tenant by the curtesie of England, and the wife shall have the third part of the inheritance of her husband, whereof he was seised in deed or in law after the espousals. &c. But in that case the wife at the death of her husband must be of the age of nine year or above, or else he shall have no dowry. D. What if the husband at his death be within the age of nine years? I suppose she shall yet have her dower: also the old Law & custome of the Realm is, that after the death of every tenant that holdeth his land by Knights service, the Lord shall have the ward and marraige of the heir, till the heir come to the age of 21. years, and if the heir in that case be of full age at the death of his ancestor, then he shall pay to his Lord his relief, which at the Common law was not certain, but by the Stat. of Magn. it is put in certain: that is to say, for every whole knights fee to pay C. s. and for a whole Baronry to pay a C. marks for relief, and for the whole Earldom to pay a C.l and after the rate. And if the heir of such a tenant be a woman, & she at the death of her ancestor be within the age of 14. years, then by the common law she should have been in Ward only till 14. years, but by the Stat. of W. 1. in such case she shall be in ward till 16. years.

And

And if at the death of her ancestor she be of the age of 14. years or above, she shall be out of ward, though the land be holden of the King, & then she shall pay relefe as an heir male shall.

Also of lands holden in Socage, if the ancestor dye, his heire being within the age of 14. years, the next friend of the heire to whom the inheritance may not descend, shal have the ward of his body and lands, till he shall come to the age of 14. years, and then hee may enter. And when the heire commeth to the age of 21 years then the gardein shall yeeld him an accompt for the profits thereof by him received.

Also, such an heire in socage for his relefe shall double his rent to the Lord the year following the death of his ancestor: as if his ancestor held by 12. d. rent, the heire in the year following shall pay the 12.d. for the rent, and other 12.d. for his relefe, and the relefe he must pay, though he be within age at the death of his ancestor

Also there is an old Law and Custome in this realme, that a free-hold by way of feoffement, gift, or lease, passeth not without livery of seisin be made upon the land according though a deed of feoffement be thereof made and delivered: but by way of surrender, partition, and exchange, a freehold may passe without livery.

Also, if a man make a will of land, whereof he is seised in his demesne as of Fee, that will is void: but if it had stood in Feoffees hand, it had been good. And also in London such a Will is good by the customs of the City, if it be inrolled.

Also, a lease for terme of years is but a chattel

by

by the law, and therefore it may passe without any livery of seisin: but otherwise it is of a state for terme of life, for that it is a Freehold in the law, and therefore livery must be made, or else the Freehold passeth not.

Also by the old custome of the realme, a man may distrein for rent reserved upon a gift in tail, a lease for terme of life, of yeares, and at will, and in such case the Lord may distrain the beasts of tenents assoon as they come upon the ground, but the beasts of strangers that come in but by manner of an escape, he may not distrain till they have been levant & couchant upon the ground: but for debt upon an Obligation, nor upon a contract, nor for account, ne yet for arrerages of account, nor for no maner of trespasse, reparations, nor such other no man may distrain.

And by the old custome of the realme all issues that shall be joyned between party and party in any court of record within the realme, except a few whereof it needeth not to treat at this time, must be tried by 12. free and lawfull men of the visn, that be not of affinity to none of the parties: and in other courts that be not of record, as in the county, court baron, hundred, & such other like, they shall be tried by the oath of the parties, and not otherwise, unlesse the parties assent that it shall be tried by the homage. And it is to be noted, that lords, barons, & all peers of the realme be excepted out of such trials if they will, but if they will wilfully be sworn therein, some say it is no errour: and they may if they will have a writ out of the Chancery, di-

rected

rected to the sheriffe, commanding him that hee shall not empannell them upon no enquest

And of this that is said before it appeareth, that the customes aforesaid nor other like unto them, whereof be very many in the lawes of England, cannot be proved to have the strength of law only by reason. For how may it be proved by reason that the eldest son shall onely inherite his father, and the younger to have no part, or that the husband shall have the whole land for terme of his life, as tenant by the curtesie in such manner as before appeareth, and that the wife shall have only the third part in the name of the dower, and that the husband shall have all the goods of his wife as his own, and that if he die living, the wife, that his executors shall have the goods, and not the wife: all these and such other cannot bee proved only by reason that it should be so and no otherwise, although they be reasonable, and that with the custome therin used sufficeth in the Law, and a statute made against such generall customes ought to be observed because they be not meerely the law of reason

Also the law of property is not the Law of reason, but the law of custome, howbeit that it is kept, it is also most necessary to be kept in all realmes, and among all people, and so it may be numbred among the generall customes of the realm, and it is to understand that there is no statute that treateth of the beginning of the said customs ne while they should be holden for law, and therefore after them that be learned in the lawes of the realm, the old custome of the realm

is

is the onely and sufficient authority to them in that behalfe: and I pray thee shew mee what Doctors hold therein, that is to say, whether a custome onely be a sufficient authority of any Law. Do. Doctors hold that a Law grounded upon a custome is the most surest Law, but this thou must alwayes understand therewith, that such a custome is neither contrary to the Law of reason, nor the law of God. And now I pray thee shew me somewhat of the Maximes of the Law of England, whereof thou hast made mention before in the 4. Chap St. I will with good will.

Of the 4. ground of the Law of England.

Chap. 8.

THe 4. ground of the Law of England standeth in divers principles that be called in the law Maximes, the which have been alwaies taken for law in this realm, so that it is not lawful for any that is learned to deny them: for every one of those Maximes is sufficient authority to himselfe. And which is a Maxime and which not shall alway be determined by the Judges, and not by 12. men. And it needeth not to assigne any reason why they were first received for Maximes for it sufficeth that they be not against the Law of reason, nor the law of God, & that they have alway been taken for the law. And such Maximes be not only holden for law, but also other cases like unto them, and all things that necessarily follow upon the same, are to be reduced unto the like law, & therefore most commonly there be assigned some reasons

sons or consideration why such Maxims be reasonable, to the intent that other cases like may the more conveniently be applyed to them. And they be of the same strength and effect in the law as statutes be. And though the generall customes of the Realm, be the strength and warrant of the said Maxims, as they be of the generall customes of the Realm, yet because the said generall customes be in manner known through the Realm, as well to them that be unlearned as learned, and may lightly be had and known, and that with little study; and the Maxims be only known in the Kings Courts, or among them that take great study in the Law of the realm and among few other persons: therefore they be set in this writing for generall grounds, and he that listeth may so accompt them, or if he will, he may take them for no ground, after his pleasure. Of which Maxims I shall hereafter shew three part.

First, there is a Maxime, that Escuage uncertain maketh Knights service.

Also, there is another Maxime, that Escuage certein maketh socage.

Also, that he that holdeth by Castle-gard holdeth by Knights service, but he holdeth not by Escuage. And that he that holdeth by 20.s to the gard of a Castle, holdeth by socage

Also, there is a Maxime that a Discent taketh away an entry.

Also, that no Prescription in lands maketh a right.

Also, that a Prescription of rents and profits appyender out of land maketh a right.

Also,

Also, that the limitation of the prescription generall taken, is from the time of no mans mind runneth to the contrary.

Also, that assignes may be made upon lands given in fee, for terme of life, or for terme of years though no mention be made of assignes: the same law is of a rent that is granted, but otherwise it is of a Warranty and of a covenant.

Also, that a condition to avoyd a Freehold cannot be pleaded without deed. but to avoyd a gift of chattell it may bee pleaded without deed.

Also, that a release or confirmation made by him that at the time of the release confirmation made h no right, is voyd in the Law, though a right come to him after, except it bee with warranty, and then it shall bar him of all right that hee shall have after the warranty made.

Also, that a right or title of action that onely dependeth in action, cannot be given nor granted to none other but only to the tenant of the ground or to him that hath the reversion or remainder of the same.

Also, that in an action of debt upon a contract the defendant may wage his Law. but otherwise it is upon a lease of Lands for terme of yeares, or at will.

Also, if that any exigent in case of felony bee awarded against a man: he hath thereby forthwith forfeited his goods to the King.

Also, if the sonne be attainted in the life of the father, and after hee purchaseth his charter

of pardon of the King, and after the father dyeth: In this case the land shall eschеat to the Lord of the fee, in so much that though he have a younger brother, yet the land shall not descend to him: for by the attainder of the elder brother the blood is corrupt, and the father in law, dyed without heire.

Also, if an Abbot or Prior alien the lands of his house and dyeth, in this case, though his successor have right to the lands, yet he may not enter, but he must take his action that is appointed him by law.

Also, there is a Maxim in the law, that if a villain purchase lands, and the Lord enter, hee shall enjoy the land as his owne: but if the villain alien before the Lord enter, the alienation is good. And the same law is of goods.

Also, if a man steal goods to the value of twelve pence or above, it is felony, and he shall dye for it. And if it be under the value of 12 pence, then it is but petite larceny, and he shall not die for it, but shall be otherwise punished after the discretion of the Judges, except it be taken from the Person: for if a man take any thing how little soever it bee, from a mans person feloniously, it is called robbery, and hee shall dye for it.

Also, he that is arraigned upon an Inditement of felony, shall bee admitted in favour of life to challenge 36, Jurors peremptorily; but if he challenge any above that number, the Law taketh him as one that hath refused the Law, because he hath refused three whole Enquests, and therefore he shall dye: but with

with cause he may challenge as many as he hath cause of challenge to. And further it is to be understood that such peremptory challenge shal not be admitted in appeal, because it is at the suit of the party.

Also, the land of every man is in the law enclosed from other, though it lye in the open field. And therefore if a man do trespas therein, the writ shall be Quare clausum fregit.

Also the rents commons of pasture, of turbary, reversions, remainders, nor such other things which lye not in manuall occupation, may not be given nor granted to none other without writing.

Also, that he that recovereth debt or damages in the Kings Courts by such an action wherein a Capias lay in the procesſe may within a year after the recovery, have a Capias ad satisfaciendum to take the body of the defendant, and to commit him to prison till hee have paid the debt and damages: but if there lay no Capias in the first action, then the plaintiffe shall have no Capias ad satisfaciendum, but must take a Fieri facias, or an Elegit within the year, or a Scire facias after the year, or within the year if hee will.

Also, if a release or confirmation be made to him that at the time of the release made had nothing in the land, &c. the release or confirmation is void, except in certain cases, as to vouch, and certain other which need not here to be remembred.

Also, there is a Maxim in the Law of England, that the King may disseise no man, nor

that no man may disseise the King, ne pull any reversion or remainder out of him.

Also, the Kings excellency is so high in the law, that no freehold may be given to the King, ne be derived from him, but by matter of Record.

Also, there was sometime a Maxime and a Law of England, that no man should have a writ of right but by speciall suite to the King, & for a fine to be made in the Chancery for it. But these Maximes be changed by the stat. of Magna charta chap. 16. where it is said thus. Nulli negabimus, nulli vendemus rectum vel justiciam. And by the words Nulli negabimus, a man shall have a writ of right of course in the Chancery without suing to the King for it. And by the words Nulli vendemus, he shall have it without fine: and so many times the old Maximes of the Law be changed by statutes. Also though it be reasonable, that for the manifold diversities of actions that be in the lawes of England, that there should bee diversities of Process, as in the reall actions after one manner and in personall actions after another manner: Yet it cannot be proved merely by reason that the same Process ought to be had and none other: for by statute it might be altered. And so the ground of the said processe is to be referred onely to the Maximes and Customes of the Realme.

And I have shewed thee these Maximes before rehearsed, not to the intent to shew thee specially what is the cause of the law in them, for that would asken a great respite. But I have

have shewed them only to the intent that thou maist perceive that the said Maximes and other like, may bee conveniently set for one of the grounds of the Lawes of England. Moreover there be divers cases whereof I am in doubt whether they be only Maximes of the Law, or that they be grounded upon the Law of reason, wherein I pray thee let me hear thy opinion.

Do. I pray thee shew those cases that thou meanest: and I shall make thee answer therein as I shall see cause.

Hereafter follow divers cases, wherein the Student doubteth whether they be only Maximes of the law, or that they be grounded upon the Law of Reason.

Chap. 9.

THe law of England is, that if a man command another to doo trespasse, and he doth it, that the commander is a trespasser.

And I am in doubt whether that it be onely by a Maxime of the Law, or that it be by the Law of reason.

Also, I am in doubt upon what law it is grounded. that the Accessory shall not be put to answer before the principall, &c.

Also, the law is that if an Abbot buy a thing that commeth to the use of the house, and dyeth, that his successor shall be charged. And I am somewhat in doubt upon what ground that

Law dependeth.

Also, that hee that hath possession of Land: though it be by disseisin, hath right against all men but against him that hath right.

Also, that if an action reall be sued against any man that hath nothing in the thing demanded, the writ shall abate at the common Law.

Also, that the alienation of the tenant hanging the writ, nor his entry into religion, or if he be made a Knight, or if she be a woman and take an husband hanging the writ, that the writ shall not abate.

Also, if land and rent that is going out of the same land, come into one mans hand of like estate, and like surety of title, the rent is extinct.

Also, if land descend to him that hath right to the same land before he shall be remitted to his better title if he will.

Also, if two titles be concurrent together, that the eldest title shall be preferred

Also, that every man is bound to make recompense for such hurt as his beasts shall do in the corn or grasse of his neighbour, though he know not that they were there.

Also, if the demandant or plaintiffe hanging his writ will enter into the thing demanded, his writ shall abate. And it is many times very hard and of great difficulty to know what cases of the law of England bee grounded upon the Law of reason, and what upon customs of the Realme: and though it bee hard to discuss it, it is very necessary to be knowne, for the knowledge of the perfect reason of the

Law:

Law: and if any man think that these cases before rehearsed be grounded upon the law of reason, then he may refer them to the first ground of the law of England, which is the law of reason, whereof is made mention in the 5. chap. And if any man thinke that they be grounded upon the law of custome: then he may referre them to the Maxims of the law, which be assigned for the fourth ground of the law of England, whereof mention is made in the 8. chap. as before appeareth.

Do. But I pray thee shew me by what authority it is proved in the laws of England, that the cases which thou hast put before in the 8. Chapter, and such other which thou callest Maxims, ought not to be denied, but ought to be taken as Maximes. For sith they cannot be proved by reason, as thou agreest thy selfe they cannot, they may as lightly be denied as affirmed unless there be some sufficient authority to approve them.

Stu. Many of the Customes and Maximes of the Lawes of England be knowne by the use and the customs of the Realme so apparently, that it needeth not to have any Law written thereof. For what needeth it to have any Law written that the eldest sonne shall inherit his father: or that all the daughters shall inherit together as one heire, if there bee no sonne: or that the husband shall have the goods and chattels of his wife that shee hath at the time of the espousels, or after: or that a bastard shall not inherite as heire: or the Executors shall have the disposition of all the goods of

their testator: and if there be no executors, that the Ordinary shall have it, and the heire shall not meddle with the goods of his ancestor, but if any particular customes helpe him.

The other maximes and customes of the law that be not so openly known among the people may be known partly by the Law of Reason, and partly by the bookes of the Lawes of England called Yeares and Termes, and partly by divers Records remaining in the Kings Courts and in the Treasurie: and specially by a booke called the Register, and also by divers Statutes wherein many of the said customes and maxims be off recited, as to a diligent searcher will evidently appear.

Of the fift ground of the Law of England.

Chap. 10.

The fift ground of the Law of England standeth in divers particular customes used in divers Counties, Townes, Cities, and Lordships in this realme, the which particular customes because they be not against the Law of reason, nor the Law of God, though they be against the said generall Customes or Maximes of the Law yet nevertheless they stand in effect and be taken for law: but if it rise in question in the Kings Courts, whether there bee any such particular custome or not, it shall bee tried by 12 men, and not by the Judges, except the same particular custome bee of Record in the

the same Court. Of which particular Customes, I have hereafter noted some for example.

First, there is a custome in Kent that is called Gavelkind, that all the brethren shall inherit together, as sisters at the Common law.

Also there is another particular Custome, that is called Burghenglish, where the younger sonne shall inherit before the eldest, and that custome is in Nottingham.

Also there is a Custome in the City of London, that freemen there, may by their testament inrolled bequeath their lands that they be seised of to whom they will, except to Mortmain. And if they be Citizens and Freemen that they may also bequeath their Lands to Mortmaine.

Also, in Gavelkind, though the Father bee hanged, the son shall inherit. For their custome is, The Father to the bough, the Sonne to the plough.

Also, in some Countries the wife shall have the halfe of the husbands lands in the name of her dowry, as long as she liveth sole.

And in some Country the husband shall have the halfe of the inheritance of his wife, though he have no issue by her.

Also, in some Country an Infant when hee is of age of xb yeares may make a feoffement, and the feoffement good. And in some Country when he can mete an ell of cloth.

Of the sixt ground of the Law of England.

Chap.

Chap. 11.

The first ground of the Law of England standeth in divers statutes made by our Soveraigne Lord the King and his progenitors, and by the Lords spirituall and temporal, and the Commons in divers Parliaments, in such cases where the law of reason, the Law of God, Customes, Maximes, ne other grounds of the Law seemed not to be sufficient to punish evill men, and to reward good men. And I remember not, that I have seen any other grounds of the Law of England, but onely these that I have before remembred. Furthermore it appeareth of that I have said before, that oft times two or three grounds of the law of England must be joyned together, or that the plaintiffe can open & declare his right, as it may appeare by this example. If a man enter into another mans land by force, and after maketh feoffement for maintenance to defraud the plaintiffe from his action: In this case it appeareth that the said unlawfull entry is prohibited by the Law of reason, but the plaintiffe shall recover treble dammages, that is by reason of the statute made in the 8. yeare of King H. 6. chap. 9 And that the damages shal be cessed by 12. men, that is by the custom of the realm. And so in this case three grounds of the law of England maintain the plaintiffs action.

And so it is in divers other cases that need not to be remembred now. And thus I make an end for this time to speak any further of the grounds of the law of England. D. I thanke

thee

thee for the great paine that thou hast taken therein. Neverthelesse for as much as it appeareth that thou hast said before, that the learned men of the law of England pretend to verifie, that the Law of England will nothing doe, ne attempt against the Law of Reason, nor the law of God, I pray thee answer me to some questions grounded upon the Law of England, how, as thou thinkest the law may stand with reason or conscience in them.

Sr. Put the case, and I shall make answer therein as well as I can.

The first question of the Doctor, of the Law of England and Conscience.

Chap. 12.

I have heard say, that if a man that is bound in an Obligation pay the mony, but hee taketh no acquittance, or if hee take one and it happeneth him to leese it, that in that case hee shall be compelled by the Lawes of England to pay the money againe. And how it may bee said then, that that Law standeth with reason and conscience? for as it is grounded upon the Law of reason, that debts ought of right to be paid, so it is grounded upon the Law of Reason (as it seemeth) that when they be payed, that he that payed them should bee discharged. Stu. First, thou must understand, that it is not the Law of England, that if a man that is bound in an Obligation pay the money without Acquittance, or if

he

he take acquittance and leese it, that therefore the law determineth that he ought of right to pay the mony effsoones, for that law were both against reason and conscience. But though it is so, that there is a generall Maxime in the Law of England, that in an action of debt sued upon an Obligation, the defendant shall not plead that he oweth not the mony, ne can in no wise discharge himselfe in that action, but hee have acquittance or some other writing sufficient in the Law, or some other thing like, witnessing that he hath paid the money: that is ordained by the Law to avoyd a great inconvenience that else might happen to come to many people; that is to say, that every man by a Nude parol, and by a bare Averiement should avoid an Obligation. Wherefore to avoyd that inconvenience, the Law hath ordained, that as the defendant is charged by a sufficient writing, that so he must be discharged by sufficient writing, or by some other thing of as high authority as the Obligation is. And though it may follow thereupon, that in some particular case a man by occasion of that generall Maxime may be compelled to pay the mony againe that he paid before: Yet nevertheless no default can be thereof assigned in the Law. For like as makers of Law take heed to such things as may oft fall, and do much hurt among the people, rather then to particular cases: So in like wise the generall grounds of the law of England, heed more what is good for many, then what is good for one singular person onely. And because it should be a hurt to many,

if

if an Obligation should bee so lightly avoyded by word, therefore the law specially preventeth that hurt under such manner as before appeareth: and yet intendeth not, nor commandeth not, that the money of right ought to bee paid againe, but letteth a generall rule which is good and necessary to all the people. and that every man may well keep, without it be through his own default. And if such default happen in any person, whereby hee is without remedy at the common law, yet he may be holpen by a Subpœna, and so he may in many other cases where conscience serveth for him, that were too long to rehearse now.

Do. But I pray thee shew me under what manner a man may be holpen by conscience. And whether he shall be holpen in the same court, or in another.

Stu. Because it cannot bee well declared where a man shall be holpen by conscience, and where not, but it be first knowne what conscience is, therefore because it pertaineth to thee most properly to treat of the nature and quality of conscience, therefore I pray thee that thou will make me some briefe declaration of the nature and quality of conscience, and then I shall answer to thy question as well as I can.

D. I will with good will doe as thou saist, and to the intent that thou maiest the better understand that I shall say of conscience, I shall first shew thee what Sinderesis is and then what reason is, and then what conscience is; and how these three differ among themselves, I shall somwhat touch.

What

The 13. Chapter.

§ What Sindereſis is.

Chap. 13.

SIndereſis is a naturall power of the ſoule ſet in the higheſt part thereof, moving and ſtirring it to good, and abhorring evill. And therefore Sindereſis never ſinneth nor erreth. And this Sindereſis our Lord put in man to the intent that the order of things ſhould bee obſerved. For after Saint Dioniſe, the Wiſedome of God joyneth the beginning of the ſecond things to the laſt of the firſt things: For Angell is of a nature to underſtand without ſearching of reaſon, and to that nature man is joyned to Sindereſis, the which Sindereſis may not wholly be extincted neither in man, ne yet in damned ſoules. But nevertheleſſe as to the uſe and exerciſe thereof, it may be left for a time, either through the darkneſſe of ignorance, or for undiſcreet delectation, or for the hardneſſe of obſtinacie. Firſt by the darkneſſe of ignorance Sindereſis may be let, that it ſhall not murmure againſt evill, becauſe he believeth evill to bee good, as it is in heretikes the which when they dye for the wickedneſſe of their errour, beleeve that they dye for the very truth of the faith. And by undiſcreet delectation, Sindereſis is ſometime ſo overlaid, that remorſe or grudge of conſcience for that time can have no place. For the hardneſs of obſtinacy Sindereſis is alſo let that it may not ſtirre to goodneſſe, as it is in damned ſoules that be ſo obſtinate in evill,

that

that they may neuer be enclined to good. And though Sindereſis may be ſaid to that point extinct in damned ſoules, yet it may not be ſaid that it is fully extinct to all intents. For they alway murmure againſt the euill of the paine that they ſuffer for ſinne, and ſo it may not bee ſaid that it is univerſally, and to all intents and to all times extinct. And this Sindereſis is the beginning of all things that may be learned by ſpeculation or ſtudy and miniſtreth the generall grounds and principles thereof: and alſo of all things that are to be done by man. An example of ſuch things as may be learned by ſpeculation appeareth thus: Sindereſis ſaith that euery whole thing is more then any one part of the ſame thing, & that is a ſure ground that neuer fayleth, and an example of things that are to be done, or not to be done: as where Sindereſis ſaith no euill is to be done, but that goodneſs is to be done and followed, and euill to be fled and ſuch other.

And therefore Sindereſis is called by ſome men, the Law of reaſon, for it miniſtreth the principles of the law of reaſon, the which be in euery man by nature, in that he is a reaſonable creature.

§ Of Reaſon,

Chap. 14.

When the firſt man Adam was created he receiued of God a double eye, that is

is to say an outward eye, whereby he might see visible things, and know his bodily enemies and eschew them. And an inward eye that is the eye of reason, whereby he might see his spirituall enemies that fight against his soule and beware of them. And among all gifts that God gave to man, this gift of reason is the most noblest, for thereby man excelleth all beasts, and is made like to the dignity of Angels, discerning troth for falshood, and evill from good. Wherefore he goeth farre from the effect that he was made to, when he taketh not heed to the truth, or when he preferreth evill before good.

And therefore, after Doctors, Reason is the power of the soule, that discerneth betweene good and evill, and between good and better, comparing the other: the which also sheweth vertues, loveth good, and flyeth vices. And reason is called righteous and good, for it is conformable to the will of GOD, and that is the first thing, and the first rule that all things must be ruled by. And reason that is not righteous nor straight, but that is said culpable, is either because she is deceived with an Errour that might be overcome, or else through her pride or loathfulnesse she enquireth not for knowledge of the truth that ought to be enquired. Also reason is divided into two parts that is to say, into the higher part and into the lower part.

The higher part hideth heavenly things and eternall, and reasoneth by heavenly lawes or by heavenly reason what is to be done, & what

is

is not to be done, and what things God commandeth, and what he prohibiteth. And this higher part of reason hath no regard to transitory things or temporall things, but that sometime as it were by manner of counsell she bringeth forth heavenly reasons to order well temporall things. The lower part of reason worketh most to governe well temporall things, and she groundeth her reasons much upon lawes of man and upon reason of man, whereby she conclu-deth that that is to be done, that is honest & expedient to the common wealth, or not to be done, that is not expedient to the Common-wealth. And to that reason whereby I know God, and such things that pertaine to God, belongeth to the highest part of reason. And the reason whereby I know creatures, belongeth to the lower part of reason. And though these two parts, that is to say, the higher part and the lower part, be one in deed & essence, yet they differ by reason of their working, and of their office, as it is of one self eye, that sometime looketh upward, and sometime downward.

§ Of Conscience.

Chap 15.

This word Conscience, which in Latine is called conscientia, is compounded of this prepositon cum, that is to say in English with, & of this noune scientia, that is to say in English, knowledge; & so Conscience is as much to say, as knowledge of one thing with another thing; & conscience to write, is nothing els but

an applying of any science or knowledge to some particular act of man. And so conscience may sometime erre, & sometime not erre. And of conscience thus taken doctors make many descriptions, whereof one doctor saith, that conscience is the law of our understanding. Another, that conscience is an habit of the minde discerning betweene good and evill. Another, that conscience is the judgement of reason, judging on the particular acts of man: all which sayings agree in one effect (that is to say) that conscience is an actuall applying of any cunning or knowledge to such things as be to be done; whereupon it followeth, that upon the most perfect knowledge of any law or cunning & of the most perfect and most true applying of the same to any particular act of man, followeth the most perfit, the most pure, & the most best conscience. And if there be default in knowing of the truth of such a law, or in the applying of the same to particular acts, then thereupon followeth an error or default in conscience, as it may appeare by this example. Sinderesis ministreth an universal principle that never erreth (that is to say) that an unlawfull thing is not to be done. And then it might be taken by some man that every oath is unlawfull, because the Lord saith Mat. 5. Ye shal in no wise swear: & yet he that by reason of the said words will hold that it is not lawful in no case to swear erreth in conscience, for he hath not the perfit knowledge & understanding of the truth of the said gospel, nor he reduceth not the saying of scriptures to other script. in which it is granted that in some case an oath may be lawfull, & the cause why

why conſcience may ſo erre in the ſaid caſe, & in other like, is becauſe conſcience is formed of a certaine propoſition or queſtion grounded particularly upon univerſal rules ordained for ſuch things as are to be done. And becauſe a particular propoſition is not knowen to himſelfe, but muſt appear, and be ſearched by a diligent ſearch of a reaſon, therefore in ſearch & in the conſcience that ſhould be formed thereupon, may happen to be erroꝛ, & therupon it is ſaid that there is erroꝛ in conſcience: which erroꝛ commeth either becauſe he doth not aſſent to that he ought to aſſent unto, or elſe becauſe his reaſon whereby hee doth referre one thing to another, is diſtorted. For further declaration whereof it is to underſtand that erroꝛ in conſcience cometh 3. maner of waies. Firſt is through ignorance: and that is when man knoweth not what he ought to do, & then he ought to aske counſell of them that hee thinks moſt expert in that ſcience, whereupon his doubt riſeth. And if he can have no counſel, then he muſt wholly commit him to God, & he of his goodneſſe will ſo ordeꝛ him, that he will ſave him from offence. The ſecond is through negligence as when a man is negligent to ſearch his own conſcience, or to enquire the truth of other. The 3. is through pride, as when he will not meeken himſelf, ne believe them that be better & wiſer then he is. The fourth is through ſingularity, as when a man followeth his own wit & will not conforme himſelfe to other, nor follow the good common waies of men. The fift is thorough an inordinate affection to himſelfe, whereby he maketh conſcience to follow his deſire,

and so he causeth her to go out of her right course. The 6. is through pusillanimity, whereby some person dreadeth oft times such things as of reason he ought not to dread. The 7. is through perplexity, & this is when a man beleeveth himselfe to be so set betwixt two sins, that he thinketh it unpossible, but that he shall fall into the one; but a man can never be so perplexed indeed but through an error in conscience, & if he will put away that error he shall be delivered; therefore I pray thee that thou wilt alwaies have a good conscience, and if thou have so, then shalt alwaies be merry, & if thine owne heart reprove thee not, thou shalt alwaies have inward peace. The gladnesse of right wisemen is of God & in God, and their joy alwaies is in truth & goodnesse. There be many diversities of conscience but there is none better then that, whereby a man truely knoweth himself Many men know many great & high cunning things, & yet know not themselves. and truely he that knoweth not himselfe knoweth nothing well. Also he hath a good and clean conscience, that hath purity and cleannesse in his heart, truth in his word & right wilfulnesse in his deed. And as a light is set in a lantern that all that is in the house may be seen thereby, so Almighty God hath set conscience in the middest of every reasonable soule as a light whereby he may discern & know what he ought to do. & what he ought not to doe. Therefore forasmuch as it behoveth thee to be occupied in such things as pertain to the law: It is necessary that thou ever hold a pure and clean conscience, specially in such things as concern restitution:

tution: for the ſin is not forgiven but if the thing that is wrongfully taken bee reſtored. And I counſell thee alſo that thou love that is good & fly that is evill, & that thou do to another as thou wouldſt ſhould be done to thee, and that thou doe nothing to other that thou wouldeſt not ſhould be done to thee: That thou do nothing againſt truth, that thou live peaceably with thy neighbor and that thou do Juſtice to every man as much as in thee is. And alſo that in every generall rule of the law, thou do obſerve & keep equity: and if thou do thus, I truſt the light of the lanterne, that is thy conſcience, ſhall never be extincted. S. But I pray thee ſhew mee what is that Equity that thou haſt ſpoken of before, and that thou wouldſt that I ſhould keep Do. I will with good will ſhew thee ſomewhat therof.

§ What is Equity.

Chap. 16.

EQuity is a right wiſeneſs that conſidereth all the particular circumſtances of the deed, the which alſo is tempered with the ſweetneſſe of mercie. And ſuch an Equity muſt alwayes be obſerved in every law of man, & in every generall rule thereof: & that knew he well, that ſaid thus, Laws covet to be ruled by equity. And the wiſe man ſaith, Be not overmuch right wiſe: for the extreame right wiſeneſs is extreme wrong, as who ſaith, if thou take all that the words of the Law giveth thee, thou ſhalt ſometime do againſt the law: & for the plainer declaration what equity is, thou ſhalt underſtand,

that ſith the deeds & acts of men for which lawes bin ordained, happen in divers manners infinitely. It is not poſſible to make any generall rule of the law, but that it ſhall faile in ſome caſe, and therefore makers of lawes take heed to ſuch things as may often come, and not to every particular caſe for they could not though they would. And therefore to follow the words of the law were in ſome caſe both againſt juſtice and the common wealth. Wherefore in ſome caſes it is neceſſary to leave the words of the law, and to follow that reaſon & juſtice requireth, & to that intent equity is ordained: that is to ſay to temper & mitigate the rigor of the Law. And it is called alſo by ſome men Epicaia the which is no other thing but an exception of the law of God or of the law of reaſon from the generall rules of the law of man, when they by reaſon of their generality would in any particular caſe judge againſt the Law of God or the Law of Reaſon, the which exception is ſecretly underſtood in every generall rule of every poſitive Law. And ſo it appeareth that equity taketh not away the very right, but onely that that ſeemeth to be right by the generall words of the law: not yet is not ordained againſt the cruelneſs of the law, for the law in ſuch caſe generally taken is good in himſelfe, but equity followeth the law in all particular caſes where right & juſtice requireth, notwithſtanding the generall rule of the Law be to the contrary: wherefore it appeareth that if any law were made by a man without any ſuch exception expreſſed or implied, it were manifeſtly unreaſonable & were not to be ſuffered: for ſuch cauſes

might

might come that he that would obserue the law should breake both the law of God, and the law of reason. As if a man make a vow that he will neuer eat white meat, & after it happened him to come there where he can get no other meat. In this case it behoueth him to breake his a vow, for the particular case is excepted secretly from his generall a vow by his equity or Epicay, as it is said before. Also if a law were made in a City, that no man under the paine of death should open the gates of the City before the Sun rising: yet if the Citizens before that hour flying from their enemies come to the gates of the City, and one for saving of the Citizens openeth the gates before the houre appointed by the law, yet he offendeth not the law, for that case is excepted from the said generall law by equity, as is said before; & so it appeareth that equity rather followeth the intent of the law, then the words of the law: And I suppose that there be in like wise some like equities grounded on the generall rules of the law of the Realme. S. Ye verily, whereof one is this, there is a generall prohibition in the lawes of England, that it shall not be lawfull to any man to enter into the freehold of another without authority of the owner or the law: but yet it is excepted from the said prohibition by the law of reason, that if a man drive beasts by the high way, and the beasts happen to escape into the corne of his neighbour, and he to bring out his beast that they should do no hurt, goeth into the ground, and setteth out his beasts, there he shall justifie that entry into the ground by the law. Also notwithstanding the Statute

of Ed. 3. made the 14 yeare of his reign, whereby it is ordained that no man upon paine of imprisonment should give any almes to any valiant beggar that is well able to labour: yet if a man meete with a valiant beggar in so cold a weather and so light apparell, that if he have no clothes he shall not be able to come to any towne to have succour, but is likely rather to dye by the way, and therefore giveth him apparell to save his life, he shall bee excused by the said statute, by such an exception of the law of reason as I have spoken of. Do. I know well that as thou saist he shall be excepted of the said sta. by conscience, & over that, that he shall have great reward of God for his good deed, but I would wit whether the party shall bee so discharged in the common law, by such an exception of the law of reason or not: for though ignorance unbincible of a statute excuse the party against God, yet (as I have heard) it excuses not in the lawes of the realme, ne yet Chancery, as some say, although the case bee so that the party to whom the forfeiture is given may not with conscience leade it. St. Germ. by thy question thou hast put me in a great doubt, wherefore I pray thee give me a respite thereon to make thee an answer, but I suppose for the time (howbeit I will not fully affirm it to be as I say) it should seeme that hee should well plead it for his discharge at the common Law, because it shall be taken that it was the intent of the makers of the statute to except such cases. And the Judges may many times judge after the mind of the makers as farre as the letter may suffer,

and

and to it seemeth they may in this case. And diuers other exceptions there be also from other generall grounds of the law of the Realme by such equity, as thou hast remembred before, that were too long to rehearse now. D. But yet I pray thee shew me shortly somewhat more of thy mind under what manner a man may be holpen in this realm by such equity? S. I will with good will shew thee some what therein.

§ In what manner a man shall be holpen by equity in the laws of England.

Chap. 17.

FIrst it is to be understood, there be in many cases diuers exceptions from the generall grounds of the law of the Realme by other reasonable grounds of the same Law, whereby a man shall be holden in the common Law. As it is of this generall ground, that it is not lawfull for any man to enter upon a descent, yet the reasonableness of the Law excepteth from the ground, an infant that hath right, and hath suffered such a Descent, & him also that maketh continuall claims, and suffereth them to enter, notwithstanding the descent. And of that exception they shall have advantage in the common law. And so it is likewise of diuers Statutes, as of the Statute whereby it is prohibited, that certain particular tenants shall do no waste, yet if a lease for term of years be made to an infant that is within years of discretion as of the age of 12 or 14. years, & a stranger do waste, in this case this in-

infant shall not be punished for the waste, for hee is excepted & excused by the law of reason. And a woman covert to whom such a lease is made after the coverture, shal be also discharged of waste after her husbands death, by a reasonable maxime and custom of the real And also for reparations to be made upon the same groundit is lawfull for such particular tenants to cut downe trees upon the same groundto make reparations. But the cause there I suppose is, for that the minde of the makers of the said statute, shall be taken to be. that that case should be excepted. And in all these cases the parties shall be holpen in the same court and by the common law: thus it appeareth that sometime a man may be excepted from the rigor of a maxime of the law by another maxime of the Law. And sometime from the rigor of a statute by the law of reason, and sometime by the intent of the makers of the stat. but yet it is to be understood, that most commonly where any thing is excepted from the generall customes or maximes of the lawes of the Realm by the law of reason, the party must have his remedy by a writ that is called a Subpœna, if a Subpœna lye in the case. But where a Subpœna lyeth, and where not, it is not our intent to treat of at this time. And in some case there is no remedy for such an equity by way of compulsion, but all remedy therin must be committed to the conscience of the party.

Do. But in case where a Subpœna lyeth, to whom shall it be directed, whether to the Judge or the party? St. It shall never be directed to the Judge, but to the party plaintiffe, or to his Attorney

turney, and thereupon an Injunction commanding them by the same under a certaine paine therein to be contained, that he proceed no further at the common law, till it be determined in the Kings Chancery, whether the plaintiffe hath title in conscience to recover, or not. And when the plaintiffe by reason of such an Injunction ceaseth to ashe any further processe, the Iudges will in like wise cease to make any further processe in that behalfe.

D. Is there any mention made in the Law of England of any such equities? S. Of this terme equity, to the intent that is spoken of here, there is no mention made in the law of England, but of an equity derived upon certaine statutes mention is made many times and often in the Law of England: but that equity is all of another effect then this. But of the effect of this equity that wee now speake of, mention is made many times: for it is oft times argued in the Law of England, where a Subpœna lyeth, and where not, and dayly Bils bee made by men learned in the Law of this Realme, to be Subpœna's. And it is not prohibited by the Law, but that they may well do it, so that they make them not, but in case where they ought to be made, and not for vexation of the party, but according to the truth of the matter. And the Law will in many cases that there shall be such remedy in the Chancery upon divers things grounded upon such Equities, and then the Lord Chancellour must order his conscience after the rules and grounds of the Law of the Realme,

in

insomuch that it had not been inconvenient to have assigned such remedy in the Chancery upon such equities for the seventh ground of the Law of England: but forasmuch as no record remaineth in the Kings Court of no such Will, ne of the writ of Subpœna or Injunction, that is sued thereupon, therefore it is not set as for a speciall ground of the law, but as a thing that is suffered by the law. D. Then sith the parties ought of right in many cases to be holpen in the Chancery upon such equities: it seemeth that if it were ordained by statute, that there should be no remedy upon such equities in the Chancery, nor in none other place, but that every matter should be ordered onely by the rules and grounds of the common Law, that the Statutes were against right and conscience. St. I think the same but I suppose there is no such statute. D. There is a statute of that effect, as I have heard say wherein I would gladly heare thy opinion. Stu. Shew me that statute, and I will with good will say as mee thinketh therein.

§ Whether the Statute hereafter rehearsed by the Doctor be against conscience or nor.

Chap. 18.

There is a Stat. made in the 4. yeere of K. H. 4. c. 22. whereby it is enacted that judgement given by the Kings Courts, shall not be examined in the Chancery, Parliament, nor

nor elsewhere, by which Statute it appeareth that if any judgement bee given in the Kings courts against an equity or against any matter of conscience, that there can bee had no remedy by that equity; for the judgement cannot be reformed without examination, and the examination is by the said Statute prohibited, wherefore it seemeth that the said Statute is against conscience: What is thine opinion therein?

S. If judgement given in the Kings Courts should be examined in the Chancery before the Kings Counsell or any other place, the plaintiffes or demandants should seldome come to the effect of their suit, ne the law should never have end. And therefore to eschew that inconvenience that Statute was made. And though peradventure by reason of the Statute some singular person may happen to have losse, nevertheless the said Statute is very necessary to eschew many great vexations and unjust expences, that would else come to many plaintiffes that have right wisely recovered in the Kings Courts. And it is much more provided for in the Law of England that such not damages should not come to many, then only to one. And also the said Stat. doth not prohibit equity, but it prohibiteth onely the examination of the judgement for the eschewing of the inconvenience before rehearsed. And it seemeth that the said Statute standeth with good conscience: In many other cases where a man doth wrong yet he shall not be compelled by way of compulsion to reforme it, for many times it must be left to the conscience of the party, whether he will redresse

dresse it or not. And in such case he is in conscience as well bound to redresse it if he will save his soule, as he were if hee were compellable thereto by the law, as it may appear in divers cases that may be put upon the same ground. Doct. I pray thee put some of these cases for an example. Stu. If the defendant wage his law in an action of debt brought upon a true debt, the plaintife hath no meanes to come to his debt by way of compulsion, neither by Subpœna nor otherwise, & yet the defendant is bound in conscience to pay him. Also if the grand Jury in attaint affirme a false verdict given by the petty Jury, there is no further remedy but the conscience of the party. Also where there can be had no sufficient proofe, there can be no remedy in the Chancery, no more then there be in the spirituall Court. And because thou hast given an occasion to speake of conscience, I would gladly heare thy opinion where conscience shall be ruled after the law and where the law shall be ruled after conscience. D. And of that matter I would likewise gladly heare thy opinion, specially in cases grounded upon the laws of England, for I have not heard but little thereof in time past: but before thou put any case thereof. I would that thou wouldst shew me how these two questions after thy opinion are to be understood.

§ Of what Law this question is to be understood: that is to say, where conscience shall be ruled after the Law.

Chap. 19.

The

The law whereof mention is made in this question, that is to say, where conscience shall bee ruled by the law, is not as me seemeth to be understood only of the law of reason & of the law of God, but also of the law of man that is not contrary to the law of reason, nor the law of God. but that it is superadded unto them for the better ordering of the commenwealth: for such a law of man is also to bee set as a rule in conscience so that it is not lawfull for a man to determine on the one side or on the other, for such a law of men hath not only the strength of mens law, but also the Law of Reason or of the law of God, whereof it is derived: for Laws made of man, which have received of God power to make laws, be made by God. And therefore conscience must be ordred by the law as it must be upon the Law of God and upon the law of reason. And furthermore the Law whereof mention is made in the latter end of the Chapter next before. that is to say, in the question wherein it is asked where the law is to be left and forsaken for conscience, is not to bee understood of the law of reason, nor of the law of God: for the two laws may not be left, nor it is not to be understood of the law of men, that is made in particular cases, & that is consonant to the law of reason, and to the law of God and that yet that law should be left for conscience: for of such a law made by man, conscience must bee ruled, as it is said before: nor it is not to be understood of a Law made by man commanding or prohibiting any thing to bee done that is against the law of reason, or the

law

law of God. For if any law made by him bind any person to any thing that is against the said laws, it is no law but a corruption & manifest errour. Therefore after them that be learned in the laws of England, the said question, that is to say where the law is to be left for conscience and where not, it is to be understood in divers manners and after divers rules, as hereafter shall somewhat be touched.

First many unlearned persons believe that it is lawfull for them to do with good conscience all things, which if they do them, they shall not be punished therefore by the law, though the law doth not warrant them to do that they do, but onely when it is done, doth not for some reasonable consideration punish him that doth it but leaveth it onely to his conscience. And therefore many persons doe oft times that they should not do, and keepe as their own that that in conscience they ought to restore. Wherefore there is the laws of England in this case.

If two men have a wood jointly, and the one of them selleth the wood, and keepeth all the money wholly to himselfe: In this case his fellow shall have no remedy against him by law, for as they when they tooke the wood jointly, put each other in trust, and were content to occupy together: so the law sufferth them to order the profits thereof according to the trust that each of them put the other in. And yet if one tooke all the profits, he is bound in conscience to restore the halfe to his fellow: for as the law giveth him right onely to halfe the land: so it giveth him right onely in conscience

science to the halfe profits. And yet nevertheless it cannot be said in that case, that the law is against conscience, for the law neither willeth ne commandeth that one should take all the profits, but leaveth it to their conscience: so that no default can be found in the law, but in him that taketh all the profits to himselfe may bee assigned default, which is bound in conscience to reforme it, if he will save his soul, though he cannot be compelled thereto by the law. And therefore in this case and other like that opinion which some have, that they may do with conscience all that they shall not be punished for by the law if they do it, it is to be left for conscience: but the Law is not to be left for conscience.

Also many men think that if a man have land that another hath title to, if he that hath the right shall not by the action that is given him by the law to recover his right by, recover damages that then he that hath the land is also discharged of damages in conscience, and that is a great error in conscience: for though he cannot be compelled to yeeld the damages by no mans Law, yet he is compelled thereto by the law of reason, and by the Law of God, whereby we be bound to do as we would be done to & that we should not covet our neighbours goods: & therefore if tenant in taile be disseised and the disseisor dyeth seised, and then the heire in the tayle bringeth a Formedon & recovereth the land & no damages, for the law giveth him no damage in that case, yet the tenant by conscience is bound to yeeld damages to the heire in tayle from the

death of his ancestor. Also it is taken by some men, that the law must be left for conscience. Where the law doth not suffer a man to deny that he hath before affirmed in Court of Record, or for that he hath wilfully excluded himselfe thereof for some other cause: as if the daughter that is onely heire to her father, will sue liberty with her sister that is a bastard, in that case she shall not after bee received to say, that her sister is a bastard in so much that if her sister take halfe the land with her there is no remedy against her by the law. And no more there is of diversity in other estoples which were too long to rehearse now. And yet the party that may take advantage by such an estople by the law is bound in conscience to forsake that advantage, specially if he were so estopped by ignorance, & not by his owne knowledge & assent. For though the law in such cases giveth no remedy to him that is estopped, yet the law judgeth not that the other hath right unto the thing that is in variance betwixt them. And it is to bee understood that the law is to bee left for conscience where a thing is tryed and found by verdict against the truth, for in the common law the judgement must be given according as it is pleaded & tried, like as it is in other laws; that the judgment must be given according to that, that is pleaded and proved. And it is to be understood that the law is to be left for conscience. Where the cause of the law doth cease, for when the cause of the law doth cease, the law also doth cease in conscience, as appeareth in this case hereafter following.

A man maketh a leaſe for terme of life & after a ſtranger doth waſte, wherefore the leſſee bringeth an action of Treſpaſſe, and hath judgement to recover damages, having regard to the treble damages, that he ſhall yeeld to him in the reverſion And after he in the reverſion before action of waſt ſued, dieth, ſo that the action of waſt is thereby extincted: then the tenant for terme of life (though hee may ſue execution of the ſaid judgement by the law) yet he may not do it by conſcience. for in conſcience hee may take no more then he is hurted by the ſaid treſpaſs, becauſe he is not charged over with treble dimmages to his leſſor. Alſo it is to be underſtood where a law is grounded upon a preſumption, if the preſumption be untrue then the law is not to be holden in conſcience. And now I have ſhewed thee ſomewhat of the queſtion, that is to ſay, where the law ſhall be ruled after conſcience, I pray thee ſhew me whether there bee not like diverſities in other laws, betwixt law and conſcience. D. Yes verily, very many, wherof thou haſt recited one before, where a thing that is untrue is pleaded, and proved, in which caſe judgement muſt be given according, as well in the law Civill, as in law Canon. And another caſe is, that if the heire make not his Inventory, he ſhall be bound after the Law Civill to all the debts, though the goods amount not to ſo much: And the law Canon is not againſt that Law, and yet in conſcience the heire which in the Lawes of England is called an Executor, is not in that caſe charged to the debts, but according to the value of the goods.

And now I pray thee shew me some cases where conscience shall be ruled after the law. S. I will with good will shew thee somewhat as me thinketh therein.

§ Here followeth divers cases where conscience is to be ordered after the Law.

Chap. 20.

THe eldest son shall have and enjoy his fathers lands at the common law in conscience, as he shall in the law. And in Burgh-english the younger sonne shall enjoy the inheritance, and that in conscience. And in Gavelkind all the sonnes shall inherit the land together as daughters at the common law, & that in conscience. And there can be no other cause assigned why conscience in the first case is with the eldest brother, & in the second with the yonger brother, & in the third case with all the brethren, but because the law of England by reason of divers customes doth sometime give the land wholly to the eldest son, sometime to the youngest, & sometime to all. Also if a man of his meere motion make a feoffement of two acres of land lying in two severall shires, & maketh livery of seisin in the one acre in the name of both; In this case the feoffee hath right but only in the acre whereof livery of seisin was made, because he hath no title by the law: but if both acres had been in one shire he had good right to both. And in these cases the diversity of the law maketh the diversity of conscience.

Also,

Also, if a man of his meere motion make a feoffement of a Manor, & saith not, to have & to hold, &c. with the appurtenances; in that case the feoffee hath right to the demeine lands, and to the rents, if there be attornements, & to the common pertaining to the Manor; but he hath neither right to the advowsons appendant, if any be, nor to the villaines regardant: but if this term, with the appurtenances, had been in the deed, the feoffee had right in conscience aswell to the advowsons and villeines, as to the residue of the Manor: but if the King of his meere motion give a Manor with the appurtenances, yet the donee hath neither right in law nor conscience to the advowsons nor villeines. And the diversity of the Law in these cases make the diversity of conscience.

Also, if a man make a lease for terme of yeers yeelding to him and to his heires a certain rent, upon condition, that if the rent be behind by xl. dayes, &c. that then it shall be lawful to the lessor & his heires to reenter. And after the rent is behind, the lessor asketh the rent according to the law & it is not paid, the lessor dyeth, his heire entreth. In this case his entry is lawfull both in law and conscience: but if the lessor had dyed before he had demanded the rent, and his heire demanded the rent, & because it is not paid he reentreth, in that case his reentry is not lawfull neither in law nor conscience.

Also if the tenant in dower sow her land & die before the corne is ripe, the corne in conscience belongeth to her executors, and not to him in the reversion: but otherwise it is in conscience of

graſſe and fruits. And the diuerſity of the Law maketh there alſo the diuerſity in conſcience.

Alſo, if a man ſeiſed of lands in his demeſne as of fee, bequeath the ſame by his laſt will to another, & to his heires & dyeth: In this caſe the heire notwithſtanding the will, hath right to the land in conſcience. And the reaſon is becauſe the law judgeth that will to be void, & as it is void in the law, ſo it is void in conſcience.

Alſo, if a man grant a rent for terme of life, & make a leaſe of land to the ſame grantee for term of life, & the tenant alieneth both in fee. In this caſe he in the reuerſion hath good title to the land both in law and conſcience, & not to the rent. And the reaſon is, becauſe the land by the alienation is forfeit by the law to him in the reuerſion, and not the rent.

Alſo, if lands be given to two men and to a woman in fee, and after one of the men entermarieth with the woman, and alieneth the land and dyeth: In this caſe the woman hath right but only to the third part, but if the man and the woman had been married together, before the firſt feoffement, then the woman notwithſtanding the alienation of her husband, ſhould haue had right in the law and conſcience to the one halfe of the land. And ſo in theſe two caſes conſcience doth follow the law of the Realme. Alſo if a man haue two ſonnes one before eſpouſels & an other after eſpouſels, and after the father dieth ſeiſed of certain lands: In this caſe the younger ſonne ſhall enjoy the lands in this Realme, as heire to his father both in law and conſcience. And the cauſe is, becauſe that ſonne borne after eſpou-

espousels, is by the law of this Realme the very heire and the eldest son is a bastard. And of these cases and many other like in the lawes of England may be formed the Silogisme of conscience or the true judgement of conscience in this manner. Sinderesis ministreth the Major thus: Right wiseness is to be done to every man upon which Major the law of England ministreth the Minor thus: The inheritance belongeth to the son born after espousels, and not the son borne before espousels: then conscience maketh the conclusion, & saith, therefore the inheritance is in conscience to be given to the son borne before espousels. And so in other cases infinite may be formed by the law of the Silogisme or the right judgement of conscience: wherefore they that be learned in the law of the realme, say that in every case, where any law is ordained for the disposition of lands & goods, which is not against the law of God, nor yet against the law of reason, that the law bindeth all them that be under the law of the Court of conscience, that is to say, inwardly in his soule. And therefore it is somewhat to marvaile that spirituall men have not endeavored themselves in time past to have more knowledge of the Kings Lawes then they have done, nor that they yet doe: for by the ignorance thereof they be oft times ignorant of that that should order them according to right and justice, as well concerning themselves as other that come to them for Counsell. And now for as much as I have answered to thy questions as well as I can: I pray thee that thou wilt shew me thine opinion in divers

cases formed upon the law of England, wherein I am in doubt what is to be holden therein in conscience? D. Shew me thy questions, and I will say as me thinketh therein.

§ The first question of the Student.

Chap. 21.

IF any infant that is of the age of 20 yeers, & hath reason and wisdome to governe himselfe, selleth his land, and with the mony thereof buyeth other land of greater value then the first was, and taketh the profits thereof, whether may the infant aske his first land againe in conscience as he may by the law? D. What thinkest thou in that question? S. Me seemeth that forasmuch as the law of England in this article is grounded upon a presumption, that is to say, that infants commonly afore they be of the age of 21. yeers be not able to govern themselves that yet for as much as that presumption fayleth in this infant, that he may not in this case with conscience aske the land again that he hath sold to his great advantage, as before appeareth. D. Is not this sale of the infant & the feoffement made thereupon (if they were voidable in the law? S. Yes verily D. And if the feoffee have no right by the bargaine, nor by the feoffement made thereupon, whereby should he then have right thereto as thou thinkest? S. By conscience as me thinketh. for the reason that I have made before. D. And upon what law should that conscience be grounded, that thou spea-

speakest of? for it cannot be granted by the law of the Realme, as thou hast said thy selfe. And me thinketh that it cannot be grounded upon the Law of God, nor upon the Law of reason, for feoffements nor contracts be not grounded upon neither of those lawes, but upon the law of man, S. After the law of property was ordained, the people might not conveniently live together without contracts, and therefore it seemeth that contracts be grounded upon the Law of reason, or at the least, upon the law that is called Jus gentium. Do. Though contracts bee grounded upon the Law that is called Jus gentium, because they be so necessary and so generall among all people, yet that proveth not that contracts bee grounded upon the Law of reason: for though the law called Jus gentium bee much necessary for the people, yet it may be changed And therefore if it were ordained by Statute that there should bee no sale of land, nor no contract of goods, and if any were, that it should be void, so that every man should continue still seised of his lands and possessed of his goods, the Statute were good. And then if a man against that Statute sold his land for a summe of money, yet the seller might lawfully retaine his land according to the Statute. And then he were bound to no more but to repay the money that hee received with reasonable expences in that behalfe. And so in like wise me thinketh that in this case the infant may with good conscience reenter into his first land: because the contract after the Maximes of the Law of the Realme is void; for as I have heard, the

Maximes

Maxims of the Law be of as great strength in the Law as Statutes. And some thinke that in this case the Infant is bound to no more, but onely to repay the money to him that he sold his land unto, with such reasonable costs and charges as he hath sustained by reason of the same. But if a man sell his land by a sufficient and lawfull contract, though there lack livery of seisin or such other solemnities of the Law, yet the seller is bound in conscience to performe the contract But in this case the contract is insufficient, and so me thinketh great diversity betwixt the cases S. For this time I hold me contented with thy opinion.

§ The second question of the Student.

Chap. 21.

IF a man that hath lands for terme of life, be impanelled upon an Inquest, and thereupon seeseth issues and dieth, whether may those issues be levied upon him in the reversion in conscience as they may be by the law? D. If they may be levied by the law, what is the cause why thou doest doubt whether they may be levied by conscience? For there is a Maxime in the laws of England, that where two Titles run together, the eldest Title shall be preferred. And in this case the title of him in the reversion, is before the title of the forfeiture of the issues. And therefore I doubt somewhat whether they may be lawfully levied. Do. By that reason it seemeth thou art in doubt what the law is in this case,

case, but that must necessarily be knowne, for else it were in vaine to argue what conscience will therein. S. It is certaine that the law is such and so it is likewise if the husband forfeit issues, and die, those issues shall be levied on the lands of the wife. D. And if the law be such, it seemeth that conscience is so in likewise; for sith it is the law, that for execution of justice every man shall be impanelled when need requireth, it seemeth reasonable, that if he will not appeare, that he should have some punishment for his not appearance, for else the law should be directly frustrate in that point. And the paine, as I have heard, is, that he should lose issues to the King for his not appearence wherefore it seemeth not inconvenient nor against conscience, though the law be, that those issues shall bee levied of him in the reversion, for that the condition was secretly understood in the law, to passe with the leale when the leale was made. And therefore it is for the lessor to beware & to prevent the danger at the making of the lease. or else it shall bee adjudged his owne default. And then this particular Maxime whereby such issues shall be levied upon him in the reversion, is a particuler exception in the Law of England from the generall Maxime that thou hast remembred before. that is to say, that where two titles run together, that the eldest title shall be preserved, & so in this case the generall Maxim in this point shall hold no place, neither in law, nor in conscience. for by this particular Maxime the strength of the generall Maxime is restrained to every intent, that is to say, as well in Lawes as in conscience.

The

§ The third question of the Student.

Chap 23.

If a Tenant for terme of life, or for terme of yeers, do wast, whereby they be bound by the Lawes to yeeld to him in the reuersion treble damages and so shall forfeit the place wasted, whether is he also bound in conscience to pay those damages and to restore that place wasted immediately after the wast done, as he is in the single damages, or that he is not bound thereto till the treble damages, and place wasted be recouered in the Kings Court? Do. Before judgment giuen in the treble damages & of the place wasted, he is not bound in conscience to pay them, for it is uncertaine what he should pay: But it sufficeth that he be ready till judgement be giuen to yeeld damages according to the value of the wast, but after the judgement giuen, he is bound in conscience to yeeld the treble damages & also the place wasted. And the same law is in all Statutes Penall, that is to say, that no man is bound in conscience to pay the penalty till it be recouered by the law. S. Whether may he that hath offended against such a statute penall defend the action and hinder the judgement, to the intent he would not pay the penalty, but onely single damages? Do. If the action be taken right wisely according to the Statute, and upon a just cause the defendant may in no wise defend the action, unlesse he haue a true dilatory matter to plead, which should be hurtfull to him if he pleaded not, though he bee

not

not bound to pay the penalty till it be recovered.

§ The fourth question of the Student.

Chap. 24.

If a man enfeoffe other in certaine land upon condition, that if he enfeeffe any other that it shall be lawfull for the feoffor and his heires to reenter, &c. whether is this condition good in conscience, though it be void in the law? D. What is the cause why this condition is void in the law? S. The cause is this, by the law it is incident to every state of fee simple, that he that hath the estate may lawfully by the law, and by the gift of the feoffor, make a feoffement thereof: And then when the feoffor restraineth him after that he shall make no feoffement to no man against his owne former grant, and also against the purity of the state of a fee simple, the Law judgeth the condition to be void, but if the condition had been, that he should not have infeoffed such a man, or such a man, that condition had him good, for yet he might infeoffe other.

D. Though the said condition be against the effect of the state of a fee simple, and also against the law: nevertheless it is not against the intent that the parties agreed upon, & that at the time of the livery. And forasmuch as the intent of the parties was that if the feoffee infeoffed any man of the land, that the feoffor should enter, & to that intent the feoffee took the state and after

after breake the intent, it seemeth that the land in conscience should returne to the feoffor. Su. The intent of the parties in the lawes of England is void in many cases, that is to say if he be not ordered according to the law. And if a man of his meere motion without any recompence, intending to give lands to another and to his heires make a deed unto him, whereby he giveth him those lands to have and to hold to him for ever, intending that by the word (for ever) the feoffee should have the land to him and to his heires. in this case his intent is void, and the other shall have the land onely for terme of life. Also if a man give lands to another, & his heires for terme of 20 years, intending that if the lessee dye within the term, that then his heires should enjoy the land during the terme: In this case his intent is void, for by the law of the realm all chattels reall and personall shall goe to the executors, & not to the heire. Also if a man give lands to a man and to his wife, & to the third person, intending that every of them should take the third part of the land as three common persons should, his intent is void, for the husband and the wife as one person in the law, shall take onely the one halfe, & the third person the other halfe: but these cases be alway to be understood where the said estates be made without any recompence. And for asmuch as in this principall case the intent of the feoffor is grounded against the law, and that there is no recompence appointed for the feoffement, mee thinketh that the feoffor hath neither right to the Land by Law or conscience: for if he should have it by con-

conſcience. that conſcience ſhould bee grounded upon the Law of reaſon, and that it cannot, for conditions be not grounded upon the Law of reaſon, but upon the maximes & cuſtomes of the realme: and therfore it might be ordained by ſtatute that all conditions made upon land ſhould be void And when a condition is void by the Maximes of the Law, it is as fully void to every intent, as if it were made void by ſtatute, and ſo mee thinketh that in this caſe the feeffor hath no right to the land in law, nor in conſcience. D I am content thy opinion ſtand till we ſhall have hereafter a better leiſure to ſpeake further in this matter.

§ The fifth queſtion of the Student.

Chap. 25.

IF a fine with proclamation bee levied according to the ſtatute, and noclaime made within 5 yeers, &c. whether is the right of a ſtranger extincte thereby in conſcience, as it is in the law? Do. Upon what conſideration was that ſtatute made? S. That the right of lands and tenements might be the more certainly knowen, and not to be ſo uncertaine as they were before that ſtatute. D. And when any law of man is made for a common wealth, or for a good peace and quietneſſe of the people, or for any inconvenience or hurt to be ſaved from them, that law is good, though percaſe it extinct the right of a ſtranger, and muſt be kept in the Court of Con-

Conſcience: for as it is ſaid before in Ch 4. By laws right wiſely made by man, it appeareth who hath right to the lands & goods, for whatſoever a man hath by ſuch a Law hee hath it right wiſely. And whatſoever hee holdeth againſt ſuch a law he holdeth unright wiſely: and furthermore it is ſaid there, all the laws made by man which bee not contrary to the Law of God, muſt be obſerved and kept, & that in conſcience. And hee that reſiſteth them reſiſteth God, & he that reſiſteth them reſiſteth God. Alſo it is to be underſtood that poſſeſſions and the right thereof is ſubject to the laws, ſo that they therefore with a cauſe reaſonable may be tranſlated and altered from one man to another, by the act of the Law. And of this conſideration that Law is grounded, that by a contract made in faires and markets, the property is altered except the property be to the King, ſo that the buyer pay toll, or do ſuch other things as is accuſtomed there to bee done upon ſuch contracts, and that the buyer knoweth not the former property. And in the Law Civill there is a like law, that if a man have another mans goods with a title three yeares, thinking that he hath right to it, he hath the very right unto the thing, and that was made for a law, to the intent that the property and right of things ſhould not bee uncertaine, and that variance and ſtrife ſhould not be among the people. And forasmuch as the ſaid Statute was ordained to give a certainty of title in the Lands and Tenements comprized in the fine: It ſeemeth that that fine extincteth the title of all other, aſwell in con-

conscience as it doth in the law. And sith I have answered to thy question, I pray thee let me know thy mind in one question concerning tailed lands and then I will trouble thee no further at this time.

§ A question made by the Doctor, how certain recoveries that be used in the Kings Courts to defeat tailed land, may stand with conscience.

Chap. 26.

I have heard say, that when a man that is seised of lands in the taile, selleth the land that it is commonly used, that he that buyeth the land, shall for his surety, and for the voiding of the Taile in that behalfe, cause some of his friends to recover the said lands against the said tenant in taile: which recovery as I have been credibly informed shall be had in this manner: the demandants shall suppose in their writ & declaration, that the tenant hath no entry but by such a stranger as the buyer shall list to name and appoint, where indeed the demandants never had possession thereof, nor yet the said stranger. And thereupon the said tenant in taile shall appear in the court, and by assent of the parties, shall vouch to warrant one that hath nothing to yeeld in value. And the vouchee shall appear, & the demandants shall declare against him. And thereupon he shall take a day peremptorie at the same term, and at that day by assent and covin of the parties he

shall make default, upon which default because it is a default in despite of the Court, the demandants shall have judgement to recover against the tenant in tayle, and he over in value against the vouchee, and this judgement and recovery in value, is taken for a barre of the taile for ever: how may it therefore be taken, that the law standeth with conscience, thae as it seemeth alloweth and favoureth such fained recoveries? St. If the tenant in tayle sell the land for a certaine sum of money as is agreed betwixt them, at such a price as is commonly used of other lands, and for the surety of the sale suffereth such a recovery as is aforesaid, what is the cause that moveth thee to doubt whether the said contract, or the recovery made thereupon, for the surety of the buyer that hath truly payed his money for the same, should stand with conscience? Doct. Two things cause mee to doubt therein, one is for that, that after our Lord had given the land of Behest to Abraham and to his seed, that is to say, to his children in possession alway to continue, hee said to Moses as it appeareth Levit. 25. the land shall not be sold for ever, for it is mine. And then our Lord assigned a certaine manner how the land might be redeemed in the yeere of Jubilee if it were sold before: and forasmuch as our Lord would that the Land so given to Abraham and his Children should not be sold for ever, it seemeth that he doth against the ensample of God, that alieneth or selleth the land that is given to him and to his children, as lands intailed be given. Another cause is this: it appeareth by the com-

commandement of God, that thou shalt not covet the house of thy neighbour, &c. And if that concupiscence be prohibited, more stronger then the unlawfull taking and withholding thereof is prohibited: and forasmuch as tailed land, when the ancestor is dead, is a thing that of right is belonging to his heire, for that he is heire according to the gift, how may the land with right or conscience be holden from him?

St. Notwithstanding the prohibition of Almighty God, whereby the Land that was given to Abraham and to his seed might not bee alienes for ever, yet lands within walled townes might lawfully bee alienes for ever, except the lands of the Levites, as appeareth in the said Chapter of Leviticus 25. And so it appeareth that the said prohibition was not generall for every place, and that among the Jewes. And it appeareth also that it was given only to Abraham and his Children, and so it was not generally to all people. And it appeareth also, that it extended not but only to the Land of promission, as it appeareth by the words of the said Chapter, where it is said thus, all the region of our possession shall bee sold under the condition of redeeming: whereby appeareth that Lands in other Countries bee not bound to that condition, and as they be not bound to that condition, by the same reason it followeth, that they bee not bound to the same succession. Therefore that said Law, that will that the Land given to Abraham and to his seed shall not be sold for ever

bindeth no land out of the land of promission, & some men will say, that sithen the passion of our Lord was promulgate and knowen, bindeth not there. And to the second reason which is grounded upon the commandement of God: It must needs be granted that it is not lawfull to any man unlawfully to covet the house of his neighbour, and that then more stronger hee may not unlawfully take it from him: but then it remaineth for thee yet to prove how in this case this tailed land that is sold by his ancestor, and whereof a recovery is had recorded in the Kings court may be said the lands of the heire.

D. That may be proved by the law of the Realme, that is to say, by the statute of Westminster the second cha. 1. where it is saidthus: The will of the giver expressly contained in the deed of his gift, shall be from henceforth observed, so that they to whom the tenements be so given, shall not have power to alien but that the lands gifted them dearly shall remaine to the issue or return to the donor, if the issue faile: By the which statute it appeareth evidently that though they to whom the tenements were so given, alienedthem away, that yet nevertheless they in law and conscience by reason of the said statute ought to remaine to their heires according to the gift, for it is holden commonly by all Doctors that the commandments and rules of the law of man or of the positive law that is lawfully made bind all that be subjects to the law according to the mind of the maker, and that in the Court of Conscience.

Sir,

Stu. Dost thou think that if a man offend against a statute Penal that he offendeth in conscience? Admit that he doe it not of a wilfull disobedience, or that he will not obey the law: for if he doe it of disobedience, I think he offendeth. D. If it be but onely a statute that is called Popular it bindeth not in conscience to the payment of the penalty, till it be recovered by the law, and then it doth bind in conscience: but if a statute bee made principally to remedy the hurt of one party, and for that hurt it giveth a penalty to the party, in that case the offendor of the Statute is bound immediately to restore the damages to the value of the hurt, as it is upon the statute of wast, but the penalty above the hurt hee is not bound to pay till judgement be given as it is said before: but statutes by the which it is assigned who shall have right or property to these Lands and Tenements, or to these goods or catteis, if it bee not against the law of God nor against the law of reason, bind all them that be subject to the law, in law and conscience, and such a statute is the statute of West. 2. Whereof we have treated before, wherefore it must be observed in conscience.

Stu. But some hold that the statute of Westminster the 2. was made of a singularity & presumption of many that were at the said Parliament, for exalting and magnifying of their own blood, and therefore they say that that statute made by such a presumption bindeth not in conscience.

D. It is very perilous to judge for certaine

that the said Statute was made of such presumption as thou speakest of: for there be many considerations to prove that the said Statute was not made of such presumption, but rather of a very good minde of all the Parliament, or at the least of the more part thereof, and for the common wealth of all the realm: first in the King the which in the said Parliament was the head, and most chiefe and principall part of the Parliament (as hee is in every Parliament) cannot be noted to be such intent. for it is not necessary nor it was not then in use, that lands of the Crowne should bee intailed: and in spirituall men, ne yet in certain Burgesses and Citizens of the said Parliament which at that time had no land, there can be noted no such singularity: nor yet in the Noblemen and Gentlemen nor such other as were of the said Parliament and had Lands and tenements. It is not good to judge in certaine that they did it of such presumption, but it is good and expedient in this case as it is in other cases that be in doubt, to hold the surer way and that is, that it was made of charity, to the intent that hee nor the heires of him to whom the land was given should not fall into extreame poverty, and thereby happily to run into offence against God. And though it were true as they say, that it was not made of charity but of presumption, and singularity as they speak of: Nevertheless forasmuch as the Statute is not against the Law of God, nor against the law of reason, it must be observed by all them that bee Subjects unto that

Law.

Law. For as John Gerſon in the Treatiſe that he intitled in Latine, De vita ſpirituali animæ, the fourth leſſon, and the third corollary, ſaith, that God will that makers of Lawes judge onely of outward things, and reſerve ſecret things to him. And ſo it appeareth that man may not judge of the inward intent of the deed, but of ſuch things as bee apparant and certaine, but it is not apparant that there was any ſuch corrupt intent in the makers of the ſaid Statute: how may it therefore be ſaid that the Law is good or right wiſe, that not only ſuffereth ſuch things againſt the ſtatute, but alſo againſt the commandment of God?

St. To that ſome anſwer and ſay, that when the land is ſold, and a recovery is had thereupon in the Kings Court of Record, that it ſufficeth to barre the tayle in conſcience; for they ſay, that as the tayle was firſt ordained by the Law, ſo they ſay that by the Law it is annulled againe. Do. Be thou thy ſelfe judge, if in that caſe there be like authority in the making of the tayle, as there is in the annulling thereof: for it was ordained by authority of Parliament, the which is alway taken for the moſt high Court in this Realme before any other, and it is annulled by a falſe ſuppoſell, for that, that they that bee named demandants ſhould have right to the land, where in truth they had never right thereto: whereupon followeth a falſe ſuppoſel in the writ, and a falſe ſuppoſell in the declaration, and a voucher to warrant by covin of ſuch a perſon as hath nothing to yeeld in value, and thereupon by covin

and collusion of the parties followeth the default of the vouchee, by the which default the judgment shall be given. And so all the judgment is derived & grounded of the untrue supposell & covin of the parties, whereby the law of the realm that hath ordained such a writ of Entre to help them that have right to lands or tenements is defrauded, the Court is deceived, the heire is disherited, & as it is to doubt the buyer and the seller, their heires and assignes having knowledge of the taile be bound to restitution: and verily I have heard many times, that after the law of the realme such recoveries should be no barre to the heire in the taile, if the law of the realme might be therein indifferently heard. S. I cannot see but that after the Law of the realme it is a barre of the taile; for when the tenant in taile hath vouched to Warranty, and the vouchee hath appeared and entred into the Warranty, & after hath made default in despite of the Court, whereupon judgement is given for the demandant against the tenant, & for the tenant that he shall recover in value against the vouchee: if the heire in the taile should after bring his Formedon & recover the lands intailed and after the vouchee purchaseth lands, then should the heire also have execution against him to the value of the lands intailed, as heire to his ancestor that was tenant in the first action, and so he should have his own lands and also the lands recovered in value & therfore because of the presumption that the vouchee may purchase lands after the judgement, some be of opinion, that it is in the law a good bar of the taile. D. I suppose that

that in that case then hast put, that the bouchee may barre the heire in taile of his recovery in value, because he hath recovered the first lands. M. Nevertheless I will take a respit to be advised of that recovery in value. And if thou can yet shew me any other consideration why the said recoveries should stand with conscience, I pray thee let me heare thy conceit therein; for the multitude of the said recoveries is so great, that it were great pity that one should be bound to restitution that have lands by such recoveries, sith there is none (as far as I can heare) disposed them to restore. Some men make another reason to prove that the said recoveries should be sufficient by the law to avoid the statute of Westminst. then and if they be sufficient thereto they be sufficient in conscience. D. What is their reason therein? S. In the 7. yeere of H. 8. cap. 4. among other things it is enacted that all recoverers their heires and assignes, may advow and justifie for rents, services and customes by them recovered, as they against whom they recovered might have done. And then they say that when the Parliament gave to such recoverers authority to avow and justifie for such rents, customes, and services as they recovered that the intent of the Parliament was, that such recoverers should have right to that for the which they should avow or justifie: for else they say that it should be in vaine to give them such power, and that the Parliament should be taken else in manner as fautors of wrongfull titles, and so they say that such recoveries by reason of the said Statute have

right

right by the law. D. That Statute as it seemeth was made onely to give to the recoverers, a forme to advow and justifie which they had not before, though they had recovered upon a good title. And the cause why they had no forme to avow or justifie before the said Statute was, forasmuch as the recoverers did not by the pretence of their action, affirme the possession of him or them against whom they recovered nor claimed not by them, but rather disaffirmed and destroyed their estate: And therefore they cannot alledge any continuance of their title by them, as they may that have rents, or services, or such other of the grant of other by deed or by fine. And therefore as it seemeth the most principall estate of the Statute was, that such recoverers should avow and justifie for rents, services, and customes as they should or might do that had them by fine, or deed: not having any respect as it seemeth whether they recovered against tenant in fee simple, or in fee taple, nor whether the recoveries were had upon a rightfull title. And therefore as me seemeth the said Statute neither affirmeth nor disaffirmeth the title of recoverers, whereby they do avow: For if a man had right before the recovery, the right should remaine unto him notwithstanding the said Statute, and so me seemeth that the title of them that have the land entayled by such recoveries, is nothing fortified nor affirmed by the said statute, but that they are in the same case as they were before, what thinkest thou therein? S. This matter is great, for as thou saist there be so many

that

that have tayled lands by such recoveries, that it were great pitty and heavinesse to condemne so many persons, and to judge that they all were bound to restitution. For I think there bee but few in this realme that have lands of any notable value, but that they or their ancestors, or some other by whom they claime, have had part thereof by such recoveries. Insomuch that Lords Spirituall and Temporall, Knights, Squires, rich men and poore, Monasteries, Colledges, and Hospitals have such land, for such recoveries have been used of long time: who may thinke therefore without great heavinesse, that so many men should bee bound to restitution, and that yet as thou saist, no man disposeth him to make restitution? And so I am in manner perplexed, and wot not what to say in this case, but that yet I trust that ignorance may excuse many persons in that behalfe.

Doct. Ignorance of the deed may excuse, but ignorance of the Law excuseth not, but is invincible, that is to say that they have done that in them is to know the truth: as to counsell with learned men, and aske them what the Law is in that behalfe, and if they answer them, that they may do this or that lawfully, then they bee thereby excused in conscience. But yet in mans Law they be not thereby discharged, but they that have taken upon them to have knowledge of the law, be not excused by ignorance of the Law, ne no more are they that have a wilfull ignorance, and that would rather bee ignorant then to know the truth. And therefore they will not dispose them to

aske

aske any Counsell in it, and if it be of a thing that is against the law of God, or the Law of reason, no man shall be excused of ignorance, and so there be but few that bee excused by ignorance. S. What then shall we condemne so many and so notable men? Do. We shall not condemne them, but we shall give them their perill. Stu. Yet I trust their danger is not so great that they should be bound to restitution: For John Gerson saith in his said booke called, De unitate Ecclesiastica, consideratione secunda, Quod communis error facit jus: that is to say, A common erroy maketh a right. Of which words as it seemeth some trust may be had, that though it were fully admitted the said recoveries were first had upon an unlawfull ground and against the good order of conscience, that yet nevertheless, forasmuch as they have beene used of long time, so that they have bin taken of divers men that have been right well learned; in manner as for a law, that the buyers partly be excused, so that they be not bound to restitution. And moreover it is certains that the Statute of Westminster the second, nor none other statute made by man cannot be of greater value or strength then was the bond of matrimony that was ordained of God. And though that bond of matrimony was indissolvable, yet nevertheless Moses suffered a bill of refusall of the Jews, which in Latine is called Libellum repudii, and so that might thereby forsake their wives as it appeareth Deuteron. 22. and therefore like as a dispensation was suffered against that bond, so it seemeth it may bee a-

gainſt the ſtatute. D. As to that reaſon that thou haſt laſt made of a bill of refuſall, let all purchaſers of lands heare what our Lord ſaith in the Goſpell of the Jewes, of that bill of refuſall, Matthew 19. where he ſaith thus, For the hardneſſe of your hearts *Moſes* ſuffered you to leave your wives: for at the beginning it was not ſo. Of which words Doctors hold commonly that though ſuch a bill of refuſall was lawfull, ſo that they that refuſed their wives thereby ſhould be without paine in the Law, that yet it was nuber lawfull ſo that it ſhould bee without ſin. And ſo likewiſe it may be ſaid in this caſe, that ſuch recoveries be ſuffered for the hardneſſe of the hearts of Engliſhmen, which deſire land and poſſeſſion with ſo great greedineſs that they cannot be withdrawen from it neither by the law of God nor of the Realm. And therefore the rich men ſhould not take the poſſeſſions of poore men from them by power, without colour of title, that is to ſay, neither by open diſſeiſin, or by the only ſale of the tenant in taile, and ſo to hold them againſt the expreſſe words of the ſtatute, ſuch recoveries have been ſuffered. And though for their great multitude they may happily be without paine as to the Law of the Realme, yet it is to feare that they bee not without offence, as againſt God: and as to the other reaſon, that a common error ſhould make a right, thoſe words as mee ſeemeth be to be thus underſtood, that a coſtome uſed againſt the law of man ſhall be taken in ſome countries for law, if the people bee ſuffered ſo to continue. And yet ſome men call ſuch

a custom an error, because that the continuance of that custome against the law was partly an error in the people, for that they would not obey the law that was made by their superiours to the contrary of that Custome: but it is to be understood that the said recoveries though they have been long used may not be taken to be the strength of a custome, for many as well learned as unlearned have alway spoken against them, and yet doe. And furthermore as I have heard say, a custome or a prescription in this Realme against the statutes of the realm prevailes not in the law. S. Though a custome in this realme prevaileth not against the Statute as to the law, yet it seemeth that it may prevaile against the statute in conscience: for though ignorance of a statute excuseth not in the law, nevertheless it may excuse in conscience, and so it seemeth that it may do of a custome Do. But if such recoveries cannot be brought into a lawfull custome in the Law, it seemeth they may not be brought into a Custome in conscience. for conscience must alway be grounded upon some Law, and in this case it cannot be grounded upon the Law of reason, nor upon the Law of God: and therefore if the Law of man serve not, there is no ground whereupon conscience in this case may be grounded: and at the beginning of such recoveries, they were taken to be good because the Law should warrant them to be good, and not by reason of any custome; And so if the reason of the Law will not serve in the recoveries, the custome cannot helpe, for an evill Custome

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is to be put away. And therefore me seemeth that the recoveries be not without offence against God, though happily for their great multitude, and that there should not be as it were a subversion of the inheritance of many in this Realme, as well of spirituall or temporall, they bee without paine in the Law of the Realme except such recoveries as by the common course of the Law be voideble in the Law by reason of some use, or of some other speciall matter: but what paine that is, I will not timerously judge, but commit it to the goodnesse of our Lord, whose judgements be very deep and profound, nor I will not fully affirme that they that have lands by such recoveries ought to be bee compelled to restitution: but this seemeth to me to bee good counsell, that every man hereafter hold that is certaine, and leave that is uncertaine, and that is, that hee keepe himselfe from such recoveries, and then hee shall be free from all scrupulousnesse of conscience in that behalfe.

Stu. It seemeth that in this question thou ponderest greatly the said Statute of Westminster the second, and that though it be but onely a Law made by man, that yet forasmuch as it is not against the law of reason, nor the Law of God, thou thinkest it must be holden in conscience: and over that, as it seemeth thou art somewhat in doubt, whether those recoveries bee any barre to the heire in the tayle by the Law of the Realme, unlesse that he have in value in deed upon the vouchee, and that thou wilt thereupon take a respite or thou shew thy

fall

full mind therein, and in like wise thou thinkest as I take it that those recoueries cannot be brought into a custome, but that the longer that they be suffered to continue if they be not good by the law, the greater is the offence against God. And therefore thou pondrest little that custome, but thou agreest that it is good to spare the multitude of them that be past, lest a subuersion of the inheritance of many of this realme might follow, and great strife and variance also, if they should be annulled for the time past, except there be any other speciall cause to avoid them by the Law, as thou hast touched in the last reason: but thou thinkest that it were good, that from henceforth such recoueries should be clerely prohibited, and not be suffered to be had in use, as they have been before, and thou counsellest all men therefore to refrayne themselves from such recoueries hereafter. Do. Thou takest well that I have said, and according as I have meaned. St. Now I pray thee (sith I have heard thy question of these recoueries, according to thy desire, that thou wouldst answer me to some particular questions concerning Tailed lands, whereof thou hast at this time given us occasion to speake D. Shew me these questions & I will shew thee my mind therein with good will.

The first question of the Student, concerning tailed lands,

Chap. 27.

If

If a disseisor make a gift in taile to John at Stile, and I. at S. for the redeeming of the title of the disseisee, agreeth with him that he shall have a certaine rent out of the same land to him & to his heires and for the surety of the rent it is devised that the disseisee shall release his right in the land, &c and that such a recovery as we have spoken of before, shal be had against the said I. at St. to the use of the payment of the said rent, and of the former taile: whether standeth that recovery well with conscience or not as thou thinkest? D. I suppose it doth, for it is made for the strength and surety of the taile, which the disseisee might have cleerely defeated and avoided if he would, and therefore I think if the said I. at S. had granted to the disseisee, only by his deed a certaine rent for the releasing of his title, that grant should have bound the heires in the taile for ever. And then if the disseisee for his more surety will have such a recovery, as before appeareth, it seemeth that recovery standeth with good conscience. S. It seemeth that thy opinion is right good in this matter. And also it appeareth that with a reasonable cause some particular recoveries may stand both with law and conscience to bar a taile.

§ The second question of the Student, concerning tailed lands.

Chap. 28.

If a tenant in taile suffer a recovery against him of his lands entailed, to the intent that

the recoverer shall stand seised thereof, to the use of a certaine woman whom he intendeth to take to his wife, for terme of life, and after to the use of the first Taile: and after he marrieth the same woman, whether standeth that recovery with conscience, though other recoveries upon bargaines and sales did not? Do. It seemeth yes, for though the statute bee that they to whom the tenements be so given, should not have power to alien, but that the lands after their death should remaine to their issues, or revert to the donors, if the issues failed: yet if hee to whom the land were so given, take a wife, and dyeth seised without heire of his body, and the donour enter, the woman shall recover against him the third part to hold in the name of her dowry, for terme of her life though the taile be determined. And the same law is of tenant by the Curtesie, that is to say, of him that happeneth to marry one that is an inheritrix of the Land intailed, and they have issue, the wife dyeth, and the issue dyeth, he shall hold the lands for terme of his life, as tenant by the Curtesie, notwithstanding the words of the Statute, which say that after the death of the tenant in taile without issue, the lands shall revert to the donor: and I think the cause is because the intent of the Statute shall not bee taken that it intended to put away such titles as the Law should give, by reason of the Taile: and so it seemeth that a like intent of the Statute shall be taken for Jointures, for else the Statute might be sometime a letting of Matrimony, and it is not like that the Statute intended so.

so. And therefore it seemeth that by the onely deed of the tenant in taile, a Jointure may be made by the intent of the Statute, though the words of the Statute serve not expresly for it: for many times the intent or the latter shall be taken, and not the bare letter, as it appeareth in the same Statute, where it is said, that he to whom the lands be given shal have no power to alien: yet the same statute is construed that neither he nor his heires of his body shall have no power to alien; and so me thinketh that such an intent shall be taken here for saving of jointures Sr. Truth it is, that sometime the intent of a Statute shall be taken further then the expresse letter stretcheth, but yet there may no intent bee taken against the expresse words of the Statute, for that should be rather an interpretation of the Statute, then an exposition: and it cannot bee reasonably taken, but that the intent of the makers of the said Statute was, that the land should remains continually in the heires of the taile, as long as the taile endureth: and there can no Jointure bee made neither by deed nor by recovery. but that the taile must thereby bee discontinued, and therefore this case of Jointure is not like to the said cases of tenant in Dower, or tenant by the Curtesie: for the title of Dowrie, and of Tenancie by the Curtesie groweth most specially by the continuance of the possession in the heires of the Taile, but it is not so of Jointures: and therefore by the only deed of the Tenant in the taile there may no Jointures bee lawfully made against the expresse words

of the ſtatute. And if there be any made by way of recovery, then it ſeemeth that it muſt be put under the ſame rule, as other recoveries muſt be of lands intailed.

The third queſtion of the Student. concerning tailed lands.

Chap. 29.

IF John at Noke being ſeiſed of lands in fee, his meere motion make a feoffement of certaine lands to the intent that the feoffees ſhall thereof make a gift to the ſaid Jo. at Noke to have to him and to his heires of his body, and they make the gift accoꝛding; And after the ſaid Jo. of Noke falleth into debt, wherefoꝛe hee is taken and put in pꝛiſon, and thereupon foꝛ payment of his debts, he ſelleth the ſame land, and foꝛ ſurety of the buyer hee ſuffereth a recovery to be had againſt him in ſuch manner as befoꝛe appeareth, whether ſtandeth that recovery with conſcience oꝛ not? Do. I would here make a little digreſſion to aſke thee another queſtion oꝛ that I make anſwer to thin: that is to ſay, to feele thy mind how the Law by the which the body of the debtoꝛ ſhall be taken and caſt into pꝛiſon, there to remain till he have paid the debt may ſtand with conſcience, ſpecially if hee have nothing to pay it with, foꝛ as it ſeemeth if he will relinquiſh his goods which in ſome laws is called in Latin Cedere bonis, that he ſhall not be impꝛiſoned, and that is to bee underſtood moſt ſpecially if hee bee fallen into

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poverty, and not through his owne default.
S. There is no law in the realme that the defendant may in any case Cedere bonis, and as me seemeth if there were such a law, it should not be indifferent; for as to the knowledge of him that the mony is owing to the debtor might Cedere bonis, that is to say, relinquish his goods, and yet retaine to himselfe secretly great riches. And therefore that law in this case seemeth more indifferent and righteous that committeth such a debtor to the conscience of the plaintife to whom the mony is owing, then the committing him to the conscience of him that is the debtor: for in the debtor some default may be assigned, but in him to whom the money is owing, may be assigned no default. D. But if he to whom the debt is owing, knoweth that the debtor hath nothing to pay the debt with, and that he is fallen into poverty by some casualty, and not through his owne default, doth the law of England hold that hee may with good conscience keep the debtor still in prison till he be paid? S. May verily, but it thinketh more reasonable to appoint the liberty and the judgement of conscience in that case to the debtee, then to the debtor, for the cause before rehearsed; and then the debtor, if hee knew the truth, is (as thou hast said) bound in conscience to let him goe at liberty though he be not compellable thereto by the Law. And therefore admitting it for this time, that the law of England in this point is good and just, I pray thee that thou wilt make answer to my question. Doct. I will with good will, and

therefore as me seemeth, forasmuch as it appeareth that the said gift was made for the meere liberty and freewill of the said John at Noke and without any recompence: that therefore it cannot be otherwise taken, but that the intent of the said John at Noke, as well as the time of the said feoffement, as at the time that he received againe the said gift in the taile, was, that if he happen afterwards to fall into poverty, that he might alien the said Land to relieve him with, for how may it be thought that a man will so much ponder the wealth of his heire, that he will forget himselfe? & so it seemeth that not onely the said recovery standeth with conscience, but also if he had made only a feoffement of the land, the feoffement should bee in conscience a good barre of the taile: but if the said feoffement and gift had been made in consideration of any recompence of money, or for any matrimony or such other, then the feoffement of the said Jo. at N should not bind his heire, and if he then suffered any recovery thereof, then the recovery should be of like effect as other recoveries whereof we have treated before, and that which I said it was good to favour rather for their multitude then for the conscience: and the same law is, that if the son and the heire of the said Jo. at Noke, in case that the said gift was made without recompence, alien the land for poverty after the death of his father, the recovery bindeth not but as other recoveries do; for it cannot be thought that the intent of the father was, that any of his heires in taile should for any necessity disherit all other heires in

taile

taile that should come after him, but for himselfe me thinketh it is reasonable to judge in such manner as I have said before. S. And though the intent of the said John at Noke, when hee made the said feoffement and when he took againe the said gift in taile, were that if he fell in need that hee might alien; yet I suppose that he may not alien, though perchase for the more surety hee declared his intent to be such upon the livery of seisin: for that intent was contrary to the gift that he freely took upon him, and when any intent or condition is declared or reserved against the state that any man maketh or excepteth then such an intent or condition is void by the law, as by a case that hereafter followeth will appeare: that is to say, if a man make a feoffement in fee, upon condition that the feoffee shall not alien to any man, that condition is void, for it is incident to every state of the fee simple, that hee that is so seised may alien. And like as in a fee simple there is incident a power to alien, so in a state taile there is a secret intent understood in the gift, that no alienation shall be made And therefore though the intent of the said Io. at Noke were, that if he fell into poverty that he might sell, and though he at the taking of the gift openly declared his intent to be so: yet the intent should be void by the Law as me seemeth, and if it be void by the Law it is also void in conscience, and so the said recovery must be taken in this case to be of the same effect, as recoveries of other lands intailed bee, and in no other manner.

§ The fourth question of the Student concerning Recoveries of Inheritances intailed.

Chap. 30.

If an Annuity bee granted to a man to have and to perceive to the grantee, & to the heires of his body, of the rofers of his grantor: and after the grantee suffereth a recovery against him in a writ of Entre, by the name of a rent in Dale of a like sum as the Annuity is of, with vouchers & judgement after the common course, and both parties intend that the Annuity shall be recovered: whether shall the recovery bind the heire in taile of his Annuity? D. What if it were a rent going out of Land, of what effect should the recovery be then? Stu. It should bee then of like effect as if it were of land. Do. And so it seemeth to be of this Annuity, for as me thinketh, a rent and Annuity be of one effect, for the one of them shall be paid in ready money as the other shall. S. Turneth, and yet there bee many great diversities betwixt them in the law. D. I pray you shew mee some of these diversities. Stu. Mary I shall shew thee, but I wot not whether I can shew thee all, but first thou shalt understand that one diversity is this. Every Rent, be it Rent service, Rent charge, or Rent seeke, is going out of Land, but chargeth onely the person, that is to say, the Grantor, or his heires that have Assets by discent, or the house if it be granted by a

house

house of Religion to perceive of their rents. Also of an Annuity there lyeth no action, but only a writ of Annuity against the grantor, his heires, or successors, and that writ of Annuity lyeth never against the pernour, but only against the grantor or his heires: but of a rent, the same action may lye, as doth of land as the case requireth, and it lyeth sometime of rent against the pernour of the rent, that is to say, against him that taketh the rent wrongfully. and sometime against neither. As of a rent service, Assise may lye for the Lord against the Meine, and the Disseisor, or sometime against the Meine onely if he did also the disseisin. Also an Annuity is never taken for an advers. because it is no freehold in the Law ne it shall not be put in execution upon a Statute Merchant, Statute Staple, ne Elegit, as a rent may And because the said Writ of Entre lay not in this case of this Annuity, and that it cannot be intended in the law to be the same Annuity, though it be of like sum with the Annuity, ne though the parties assented and meant to have the same Annuity recovered by the same writ of Entre, therefore the said recovery is void in law and conscience. But if such a recovery be had of rent with a voucher over, then it shall be taken to be of like effect. as recoveries of land be in such manner as we have treated of before.

§ The fifth question of the Student, concerning tailed lands.

Chap

The 31. Chapter.

Chap. 31.

IF lands be given to a man and to his wife in the name of the Jointure, by the father of the husband, to have and to hold to them and to the heires of their two bodies, begotten, and after they have issue and the husband dyeth, and the wife alieneth the land, & against the statute of 11. H. 7, suffereth a recovery thereof to be had against her to the use of the buyer, and after her son and heire apparent that is heire to the taile releaseth to the recoveries by fine & dyeth, having a brother alive, and after the mother dyeth: who hath right to the land, the buyer, or the brother of him that released? D. What is thine opinion therein, I pray thee shew me. S. Me seemeth that the buyer hath right, for by the said statute made in the 11. year of H. 7. among other things it is enacted, that if any woman which hath lands of the gift of her husband, or of the gift of any of the Ancestors, if the husband suffer any recovery thereof against her, by covin, that then such recovery shall be void, & that it shall be lawfull to him that should have the Land after the death of the woman to enter, and it to hold as in his first right: provided alway that that statute shall not extend where he that should have the land after the death of the woman is agreeable to any such alienation or recovery, so that the agreement be of record. And forasmuch as the heire in this case agreed to the said recovery and fine, which is one of the highest Records in the law, it seemeth that the buyer hath right against that heire that agreed, and against

against all that shall be heire of the taile, and that not only by the said recovery, but also by the said Statute, whereby the said recovery with assent of the heire is affirmed. D. Though the buyer in this case have right during the life of the heire that released, yet nevertheless, after his death his heire as it seemeth may lawfully enter: for the agreement whereof the Statute speaketh, must as I suppose either be had before the recovery, or else at the time of the recovery: For if a Title by reason of the said Statute be once devolute to the heire in the taile, then the right as me seemeth cannot be extinct nor put away by the only fine of the heire, no more then if he had dyed, and the next heire to him had released to the buyer by fine, in which case the release could not extinct the right of the Title, nor the right of Entre that is given by the Statute: and so as me seemeth, his next heire may therefore enter. S. As I perceive all thy doubt is in this case, because the assent of the heire was after the recovery: for if it had been at the time of the recovery, as if the heire had been vouched to warrant in the same recovery, and he had entred, and thereupon the judgement had been given, then agreed well, that the recovery should have avoided the taile for ever.

Doctor That is true, for it is in expresse words of the Statute, but when the assent is after the recovery, then mee thinketh it is not so, ne that the right of the first taile, which was reciled by the said Statute, shall not be extinct by his fine, no more then it shall in other

other saile. Stu. I will be advised upon thy opinion in this matter, but yet one thing would I move further upon this Statute, and that is this: Some say that by this Statute all other recoveries that have been had over besides these recoveries of Jointures be affirmed: for they say, that sith the Parliament at the making of this Statute knew well that many other recoveries were then used and had, to defeat Tailes, that it was like that they would so continue, which nevertheless the Parliament did not prohibite for the time to come, as it did the said recoveries of Jointures: that it is therefore to suppose, that they thought that they should stand with law and conscience: but because Jointures were made rather for the saving of inheritance of the Husband then to destroy the inheritance, they say that the Parliament thought and adjudged the alienations and Recoveries of such Jointures to be against the law & conscience, and not the alienations of other lands intailed: for if they had, they say that the Parliament would have avoided recoveries of tailed Lands generally, as well as it did of Recoveries of Jointures. Do. As to that opinion I will answer thee thus for this time, that though that the makers of the said estatute onely put away recoveries of Jointures, and not other recoveries, that yet it cannot be taken therefore that their intent was that the other Recoveries should stand good & perfect: for they speake them onely of Jointures, because there was no complaint made in the Parliament at that time, but against

against recoveries had of Jointures, and therefore it seemeth that they intended nothing concerning other recoveries, but that they should bee of the same effect as they were before, and no otherwise. And that will appeare more plainly thus: thoughthe makers of the said statute intended to put away and annull such recoveries as should be made of Jointures after a certaine day limited in the Statute, that yet they intended not to avoid, ne affirme such recoveries of Jointures as were passed before that time, and if they intended not to avoid, ne affirme the recoveries had of Jointures before that time, then how can it be taken, that they intended to put away, or affirme, other recoveries, that were passed before that time, and not if Jointures that would not affirme, ne put away recoveries passed of Jointures before that time? And so, as it seemeth they intended to spare the multitude of them that were passed of both, and not to comfort any to take them after that time. S. I am content thy opinion stand for this time, and I will aske thee another question.

§ The sixth question of the Student, concerning tailed lands.

Chap 32.

If a tenant in taile be disseised, & die, and an ancestor collaterall to the heire in taile release with a warranty, & die, & the warranty discendeth upon the heire in the taile: whether is he there-

thereby barred in conscience, as he is in the law? D. Because your principall intent at this time is to speak of recoveries, and not of warranties, & also because it hath been of long time taken for a principall maxime of the Law, that it should be a barre to the heires as well that claime by a fee simple, as by state taile, and for that also that it was not put away by the said statute of W. 2. which ordained the taile, I will not at this time make thee an answer therein, but will take a respit to be advised. Stu. Then I pray thee yet ere we depart, shew me what was the most principall cause that moved thee to move this question of recoveries had of tailed lands. D. This moved me thereto: I have perceived many times that there be many & divers opinions of these Receivers: whether they stand with conscience or not, & that it is to doubt that many persons run into offence of Conscience thereby. And therefore I thought to feele thy minde in them, whether I could perceive that it were cleere, that they served to breake the taile in law and conscience, or that it were cleerely against conscience so to breake the taile, or that it were a matter in doubt: and if it appeared a matter in doubt, or if it appeared that the matter were used cleerely against conscience, then I thought to do somewhat to make the matter appeare as it is, to the intent that they that have the rule and charge over the people as well the spirituall men as temporall men, should the rather endevour them to see it reformed for the common wealth of the people, as well in body as in soule. For when any thing is used to the dis-

displeasure of God, it hurteth not only the body, but also the soul. And temporall rulers have not only cure of the bodies, but also of the soules, & shall answer for them if they perish in their default And because it seemeth by the more apparent reason that the tailes be not broken, ne fully avoided by the said recoveries, and that yet nevertheless the great multitude of them that bee pleaded is right much to bee pondered: Therefore it were very good to prohibite them for time to come, to put away such ambiguities and doubts as arise now by occasion of the said recoveries, and so they be put as snares to deceive the people, and so will they be as long as they be suffered to continue. And me thinketh verily that it were therefore right expedient, that tailed lands should from henceforth either bee made so strong in the Law, that the taile should not bee broken by recovery, fine with proclamation, collaterall warranty, nor otherwise: or else that all tailes should be made fee simple, so that every man that list to sell his land, may sell it by his bare feoffement, & without any scruple or grudge of conscience: & then there should not be so great expences in the law, nor so great variance among the people, ne yet so great offence of conscience as there is now in many persons. S. Verily me thinketh that thy opinion is right good, and charitable in this behalfe: and that the rulers be bound in conscience to looke upon it to see it reformed and brought into good order. And verily by that thou hast said therein, thou hast brought me into remembrance, that there bee divers like snares

concerning ſpirituall matters ſuffered among the people, whereby I doubt that many ſpirituall rules be in great offence againſt God As it is of the point that ſpirituall men have ſpoken ſo much of, that prieſts ſhould not be put to anſwer before lay men, ſpecially of felonies and murders: and of the ſtatute of 4 E. 3. c. 3. where it is ſaid, that a Prohibition ſhall lye where a man is ſued in the ſpirituall Court for tithe of wood, that is above the age of 20. yeares by the name of Silva Cedua as it hath done before: and they have in open ſermons, & in divers other open communications and counſels cauſed it to be openly noted & knowen, that they ſhould be all accurſed that put prieſts to anſwer, or that maintain the ſaid ſtatute, or any other like to it. And after when they have right well perceived, that notwithſtanding all that they have done thereto, it hath been uſed in the ſame points through all the realme, in like manner as it was before: then they have ſat ſtill and let the matter paſſe, & ſo when they have brought many perſons in danger, but moſt ſpecially them that have given credence to their ſaying, & yet by reaſon of the old cuſtom have done as they did before, then there they left them: but verily it is to fear that there is to themſelves right great offence thereby, that is to ſay, to ſee ſo many in ſo great danger as they ſay they be, and to doe no more to bring them out of it, then they have done for it: if it be true as they ſay, they ought to ſtick to it with effect in all charity, till it were reformed: and if it be not as they ſay, then they have cauſed many to offend that have given credence

to

to them, and yet contrary to their owne conscience doe as they did before, & that percase should not have offended if such sayings had not been. And so it seemeth that they have in these matters done either too much or too little.

And I beseech Almighty God, that some good man may so call upon all these matters, that we have now commanded of, so that they that be in authority may somewhat ponder them, and to order them in such manner that offence of conscience grow not so lightly thereby hereafter, as it hath done in times past. And verily hee that on the Crosse knew the price of mans soule, will hereafter aske a right strait accompt of rulers for every soule that is under them, and that shall perish through their default.

Thus have I shewed unto thee in this little Dialogue, how the Law of England is grounded upon the Law of reason, the law of God, the generall Customes of the realme, and upon certaine principles that be called Maximes, upon the particular Customes used in divers Cities and countries, and upon Statutes which have been made in divers Parliaments by our Soveraigne Lord the King and his progenitors, and by the Lords Spirituall and Temporall, and all the Commens of the Realm. And I have also shewed thee in the 9. Chapter of this Booke, under what manner the said generall Customes and Maximes of the law may be proved and affirmed if they were denied, and divers other things be contained in this present Dialogue, which will appeare in

the table that is in the latter end of the Booke; as to the readers will appear. And in the end of the said dialogue, I have at thy desier shewed the my conceit concerning recoveries of tailed lands, and thou hast upon the said recoveries shewed me thine opinion. And I beseech our Lord set them shortly in a good clear way: for surely it will be right expedient for the well ordring of conscience in many persons, that they be so. And thus the God of peace and love be with us. Amen.

HEre endeth the firſt Dialogue in Engliſh, with new additions, betwixt a Doctor of Divinity, and a Student in the Laws of England. And hereafter followeth the ſecond.

In the beginning of which Dialogue the Doctor anſwereth to certain queſtions, which the Student made to the Doctor before the making of his Dialogue, concerning the Laws of England and conſcience, as appeareth in a Dialogue made between them in Latin the 24. cha. And he anſwereth alſo divers other queſtions, that the Student maketh to him in this Dialogue, of the law of England and conſcience. And in divers other Chapters of this preſent Dialogue is touched ſhortly, how the Laws of England are to be obſerved and kept in this Realm, as to temporall things aſwell in law as in conſcience, before any other laws. And in ſome of the Chapters thereof, is alſo touched that ſpirituall judges in divers caſes be bound to give their judgement according to the Kings law. And in the latter end of the book the Doctor moveth divers caſes concerning the laws of England, wherin he doubteth how they may ſtand with conſcience, whereupon the Student maketh anſwer in ſuch manner as to the Reader will appeare.

IN the latter end of our first Dialogue in Latin, I put divers cases grounded upon the Lawes of England, wherein I doubted, and yet doe, what is to be holden therein in conscience. But forasmuch as the time was then far past, I shewed thee that I would not desire thee to make answer to them forthwith at that time, but at some better leisure, whereunto thou saidst thou wouldst not onely shew thy opinion in these cases, but also in such other cases as I would put: Wherefore pray thee now (forasmuch as me thinketh thou hast good leisure) that thou wilt shew me thine opinion therein. Do. I will with good will accomplish thy desire: but I would that when I am in doubt what the law of this realm is in such cases as thou shalt put, that thou wilt shew me what the law is therein: for though I have by occasion of our first Dialogue in Latine learned many things of the lawes of this realm which I knew not before, yet nevertheless there be many more things that I am yet ignorant in, and that peradventure in these selfe cases that thou hast put & intendest hereafter to put: and as I said in the first Dialogue in Latin the 20. Chap. to search conscience upon any case of the law it is in vain, but where the law in the same case is perfectly knowne. Stu. I will with good will do as thou saist, & I intend to put divers of the same questions that be in the last Chapter of the said Dialogue in Latin and sometime I intend to alter some of them, and adde some new questions to them, as I shall be most

in

in doubt of. D. I pray thee do as thou saist, and I shall with good will either make answer to them forthwith as well as I can, or shall take longer respit to be advised, or else paradventure agree to thine opinion therein as I shall see cause. But first I would gladly know the cause why thou hast begun this Dialogue in the English tongue and not in the Latin tongue as the first cases that thou desirest to know mine opinion in, be, or in French, as the substance of the Law. S. The cause is this. It is right necessary to all men in this realme, both spirituall and temporall, for the good ordering of their conscience, to know many things of the Law of England that they be ignorant in. And though it had bin more pleasant to them that be learned in the Latin tongue, to have had it in Latin rather then in English: yet nevertheless forasmuch as many can read English that understand no Latin, & some that cannot read English by hearing it read may learn divers things by it, that they should not have learned if they were in Latin: Therefore for the profit of the multitude it is put in the English tongue rather then into the Latin or French tongue. For if it had bin in French few should have understood it, but they that be learned in the Law, & they have least need of it, forasmuch as they know the law in the same cases without it, and can better declare what conscience will thereupon, then they that know not the Law nothing at all. To them therefore that be not learned in the Law of the realme this treatise is specially made: for thou knowest well by such studies thou hast

taken to some knowledge of the Law of the realme that is to them most expedient. Doct. It is true that thou saist, and therefore I pray thee now proceed to thy questions.

§ The first question of the Student.

Chap. 1.

IF tenant in taile after possibility of issue extinct do waste, whether doth he thereby offend in conscience though hee be not punishable of waste by the law? D. Is the law cleare that he is not punishable for the waste? St. Yea verily. D. And what is the law of tenants for terme of life, or for terme of yeares of they do waste? St. They be punishable if waste, by the statutes, and shall yeild treble damages: but at the common law before the statute they were not punishable. But whether thinkest thou that before the statute they might have done waste with conscience, because they were not punishable by the law? Stu. I thinke not. for as I take, the doing of waste for such particular tenant for terme of life, for terme of yeares, or of tenants in Dower, or by the curtesie, is prohibited by the law of reason, for it seemeth of reason, that when such leases be made, or that such titles in Dower, or by the curtesie, be given by the law, that there is onely given unto them the annuall profits of the land, and not the houses and trees, and the gravell to digge and carry away, whereby the whole profit of them in the reversion should be taken away

for

for ever. And therefore at the common law for waſt done by tenant in dower, or tenant by the curteſie, there was puniſhment ordained by the Law, by a prohibition of waſt, whereby they ſhould have yeelded damages to the value of the waſt. But againſt tenant for terme of life or for terme of yeares, lay no ſuch prohibition, for there was no Maxime in the law therein againſt them, as there was againſt the other. And I think the cauſe was, foraſmuch as it was judged a folly in the leſſor that made ſuch a leaſe for terme of life, or for terme of yeares, that at the time of the leaſe he did not prohibit them that ſhould not do waſt, and ſith he did not provide no remedy for himſelfe, the Law would none provide. But yet I think not that the intent of the law was that they might lawfully and with good conſcience doe waſt, but againſt tenants in dower, and by the curteſie the law provided remedy, for they had their title by the law.

And verily me thinketh that this tenant in taile as to doing of Waſt, ſhould be like to a tenant for terme of life, for he ſhall have the land no longer then for terme of his life, no more then a tenant for terme of life ſhall, and the waſt of this tenant is as great hurt to him in the reverſion of the remainder, as is the waſt of a tenant for terme of life; and if he alien, the donor ſhall enter for the forfeiture, as he ſhall upon the alienation of a tenant for terme of life, and if hee make default in a Præcipe quod reddat, the Donor ſhall be received as hee ſhall be upon the default of a tenant for terme of life:

and therefore mee thinketh he shall also be punishable of Wast, as tenant for term of life shall. S. If he alien, the donor shall enter as thou saist because the alienation is to his inheritance and therefore it is a forfeiture of his estate: and that is by an ancient Maxime of the law that giveth that forfeiture in the same case, and if he make a default in a Præcipe quod reddat, he in the reverst on, (as thou saist) shall be received, but that is by the statute of West. 2. for at the Common law there was no such receit: and as for the statute that giveth the action of Wast against a tenant for terme of like, and for terme of yeares, it is a statute penall, and shall not be taken by equity: and so there is no remedy given against him neither by common law nor by statute, as there is against tenant for terme of life, & therefore he is not punishable of Wast by the law. D. And though he be unpunishable of Wast by the law, yet nevertheless me thinketh he may not by conscience do that, that shall be hurtfull to the inheritance after his time, sith hee hath the land but for terme of his life, no more then a tenant for terme of life may, for then he should do as they would not be done unto: For thou agreest thy selfe, that though a tenant for terme of life was not punishable of Wast before the Statute, that yet the law judged not that hee might righefully and with good conscience doe Wast: And therefore at this day if a feoffement be made to the use of a man for terme of life, though there lie no action against him for Wast, yet he offendeth in conscience of he doe Wast, as Tenant for terme of life did afore the Statute,

tute, when no remedy lay against him by the law. So that is true, but there is great diuersity betweene this tenant and a tenant for terme of life: for this tenant hath good authority by the donor to the waste, and so hath not the tenant for terme of life, as it is said before; for the estate of a tenant in taile after possibility of issue extinct is in this manner, when lands be given to a man and to his wife, and to the heires of their two bodies begotten; and after the one of them dyeth without heires of their bodies begotten, then he or she that overliveth, is called tenant in taile after possibility of issue extinct, because there can neuer be no possibility bee any heire that may inherit by force of the gift. And thus it appeareth that the donees at the time of the gift, received of the donor estate of inheritance, which by possibility might have continued for ever, whereby they had power to cut down trees, and to do all things that in waste, as tenant in fee simple might. And that authority was as strong in the Law, as if the lessor that maketh a lease for terme of life, say by expresse words in the lease for, that the Lesse shall not be punishable of waste. And therefore if the Donor in this case had granted to the Donee that they should not be punishable of waste, that grant had been void, because it was included in the gift before, as it should be upon a gift in fee simple: and so forasmuch as by the first gift, and by the livery of seisin made upon the same, the Donees had authority by the Donor to doe waste; therefore though that one of those Donees be now dead without issue, so

that

that it is certaine, that after the death of the o: ther the land shall revert to the donor: yet the authority that they had by the Donor to doe wast, continueth as long as the gift, and the li= very of seisin made upon the same continueth. And I take this to be the reason why he shall not have in aid as tenant for terme of life shall, that is to say, for that he cannot aske helpe of that Maxime whereby it is ordained, that a tenant for terme of life shall have in aid: for he cannot say but that he took a greater estate by the livery of seisin that was made to him, which yet continueth, then for terme of life: and so I think him not bound to make any restitu= on to him in the reversion in this case, for the Wast. Do Is thy minde onely to prove that this tenant is not bound to make restitution to him in the reversion for the wast: or that thou thin= kest that hee may with cleere conscience do all manner of wast? I intend to prove no more but that he is not bound to restitution to him in the reversion D Then I will right well agree to thine opin on for the reason that thou hast made: but if thy mind had bin to have pro= ved that he might with cleere conscience have done all manner of wast, I would have thought the contrary thereto, and that the tenant in fee simple may not do all manner of wast & destruc= on with conscience, as to pull downe houses and make pastures of Cities and Townes, or to do such other acts which be against the common= wealth. And therefore some will say that tenant in fee simple may not with conscience destroy his woods & conie-pits, whereby a whole coun=

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trey for their money have had suell, & yet though he do so, he is not bound by conscience to make restitution to no person in certain. But now I pray thee ere thou proceed to the second case that thou wilt somewhat shew me what thou meanest when thou saist at the common Law it was thus or thus: I understand not fully what thou meanest by that terme at the common Law. S. I will with good will shew thee what I meane thereby.

§ What is meant by this terme when it is said thus it was at the common Law.

Chap. 2.

The common law is taken three manner of wayes. First it is taken as the law of this realme of England dissevered from all other Lawes. And under this manner taken, it is oftentimes argued in the lawes of England, what matters ought of right to be determined by the common Law, and what by the Admirals Court, or by the spirituall Court: And also if an Obligation beare date out of the Realme, as in Spaine, France, or such other, it is said in the Law, and truth it is, that they be not pleadable at the common law. Secondly the common law is taken as the Kings Courts of his Bench, or of the common Place, and it is so taken when a plee is removed out of ancient demesne, for that the land is frank free & pleadable at the common Law, that is to say, in the Kings court, and not in Ancient demesne.

And

And under this manner taken, it is oftentimes pleaded also in base Courts, as in Courts Barons, the county, and the Court of Pipounders, and such other, this matter or that, &c. ought not to be determined in that Court, but at the Common Law, that is to say, in the Kings Courts, &c. Thirdly, by the common law is understood such things as were law before any statute, made in that point that is in question, so that that point was holden for Law by the generall or particular customes and Maximes of the Realme, or by the law of reason and the law of God, no other law added to them by statute nor otherwise, as is the case before rehearsed in the first Chapter, where it is said: that at the common law tenant by the curtesie and tenant in dower were punishable of wast, that is to say, that before any statute of wast made, they were punishable of wasts by the grounds & Maximes of the law, used before the statute made in that point. But tenant for terme of life, ne for terme of yeares, were not punishable by the said grounds and Maximes, till by the Statute remedy was given against them. and therefore it is said, that at the common Law they were not punishable of wast. Do. I pray thee now proceed unto the second question.

The second question of the Student.

Chap. 3.

If a man be outlawed & never had knowledge of the suit, whether may the King take all his goods

goods, and retain them in conscience as hee may by the Law D What is the reason why they be forfeited by the law in that case? S.u. The very reason for that it is an old custome and an old Maxime in the Law, that he that is outlawed shall forfeit his goods to the King, and the cause why that Maxime began was this: when a man had done a trespasse to another, or another offence, whereforе process of utlary lay, and he that the offence was done to, had taken an action against him according to the law, if he had absented himselfe and had no lands, there had been no remedy against him: for after the law of England no man shall bee condemned without answer, or that hee appeares and will not answer, except it be by reason of any Statute. Therefore for the punishment of such offendors as will not appeare to make answer and to bee justified in the Kings Court, hath been used without time of mind, and attachment in that case should bee directed against him returnable in the Kings Bench or the Common Place: and if it were returned thereupon that he had nought whereby he might bee attached, that then should goe forth a Capias to take his person, and after an Alias Capias, & then a Pluries: and if it were returned upon every of the said Capias that hee could not bee found, and hee appeared not, then should an Exigent be directed against him which should have so long a day of retourne, that five counties might be holden before the retourne thereof, and in every of the said five Counties, the defendant to bee so-

solemnly called, and if he appeareth not, then for his contumacie and disobedience of the law, the Coroners to give Judgement that he shall be outlawed, whereby he shall forfeit his goods to the King, and leese divers other advantages in the Law that needeth not hereto be remembred now And so because he was in this case called according to the law and appeareth not, it seemeth that the King hath good title to the goods both in law and conscience.

D. If he had knowledge of the suit in very deed it seemed the King hath good title in conscience as thou saist. But if he had no knowledge thereof, it seemeth not so, for the default that is adjudged in him (as appeareth by thine own reason) is his contumacie and disobedience of the law, and if he were ignorant of the suit, then can there be assigned to him no disobedience: for a disobedience implyeth a knowledge of that he should have obeyed unto.

Stu. It seemeth in this case that he should be compelled to take knowledg of the suit at his perill: for sith he hath attempted to offend the law, it seemeth reason that he shall be compelled to take heed what the law will do against him for it, and not onely that, but that he shall rather offer amends for his trespass then to tarry till he were sued for it.

And so it seemeth the ignorance of the suit is of his owne default, specially sith in the Law is set such order that every man may know if he will, what suit is taken against him, and may see the Records thereof when hee will: and so it seemeth that neither the party nor the

the law be not bounden to give him no knowledge therein. And over this I would somewhat move further in this matter thus. That though that action were untrue and the defendant not guilty, that yet the goods be forfeited to the King for his not appearance in law, and also in conscience, and that for this cause: the King as Soveraigne and head of the Law, is bounden in Justice to grant such writs, and such processes as be appointed in the Law, to every person that will complaine, be his surmise true or false, and thereupon the King (of Justice) oweth as well to make processe, to bring the defendant to answer, when hee is not guilty, as when he is guilty: and then when there is a Maxime in the Law, that if a man be outlawed in such manner as before appeareth, that he shall forfeit all his goods to the King, and maketh no exception whether the Action bee true or untrue. It seemeth that the said Maxime more regardeth the generall ministration of justice, then the particular right of the party: and therefore the property by the Outlary, and by the said Maxime ordained for ministration of justice, is altered and is given to the King as before appeareth, and that both in law and in conscience, as well as if the action were true. And then the party that is so outlawed is driven to sue for his remedy, against him that hath so caused him to be outlawed upon an untrue action.

D. If he have not sufficient to make recompence, or die before recovery can be had, what remedy is had then? St. I thinke no remedy: and

and for a further declaration in this case, and in such other like cases, where the property of goods may be altered without consent of the owner, it is to consider that the property of goods is not given to the owners directly by the law of reason, nor by the law of God, but by the law of man, & is suffered by the law of reason & by the law of God so to be. For at the beginning all goods were in common, but after they were brought by the law of man into a certaine property, so that every man might know his owne: and then when such property is given by the law of man the same law may assigne such conditions upon the property as it listeth, so they be not against the law of God, ne the law of reason, and may lawfully take away that it giveth, and appoint how long the property shall continue. And one condition that goeth with every property in this Realme is, if he that hath the property bee outlawed according to such process that is ordained by the law that he shall forfeit the property unto the King. And divers other cases there be also, whereby property in goods shall be altered in the law, and the right in Lands also without assent of the owner, whereof I shall shortly touch some without saying any authority therein, for the more shortnesse. First by a sale in open market the property is altered Also goods stolne and seised for the King, or waived, be forfeit unlesse appeale or indictment be sued. Also straies, if they be proclaimed, and be not after claimed by the owner within the year, be forfeited, & also a Deodand is forfeit to whom soever the pro-

per-

party was before (except it belonged to the K.) & shall be disposed for the soule of him that was slain therewith: & a fine with an Nonclaime at the common law, was a barre, if claime were not made within a yeare, as it is now by statute if the claime be not made within 5. yeares. And all these forfeitures were ordained by the Law upon certaine considerations which I omit at this time, but certaine it is that none of them were made upon a better consideration then this forfeiture of Utlagarie was. For if no especiall punishment should have bin ordained for offendors that would absent themselves and not appeare when they were sued in the Kings courts, many suites in the Kings courts should have bin of small effect. And sith this Maxime was ordained for the execution of Justice, & as much done therein by the common law, as policy of man could reasonably devise, to make the party have knowledge of the suite, and now is added thereto by the statute made the 6. year of H. 8. that a writ of Proclamation shall bee sued if the party be dwelling in another shire: it seemeth that such Title as is given to the King thereby in in good conscience, especially seeing that the King is bound to make processe upon the surmise of the plaintife, and may not examine but by plee of the party, whether the surmise be true or not. But if the party be returned five times called, where indeed he was never called (as in the second case of the last Chapter of the said Dialogne in Latin is contained) then it seemeth the party shall have good remedy by petition to the King, spe-

cially if he that made the returne be not sufficient to make recompence, or die before recovery can be had. Do. Now sith I have heard thine opinion in this case, whereby it appeareth that many things must be seene, or a full and a plaine declaration can be made in this behalfe, and seeing also that the plaine answer to this case shall give a great light to divers other cases that may come by such forfeiture: I pray thee give mee a farther respite, ere that I shew thee my full opinion therein, and hereafter I shall right gladly do it. And therefore I pray thee proceed now to some other case.

§ The third question of the Student.

Chap. 4.

If a stranger do wast in lands that another holdeth for terme of life without assent of the tenant for terme of life, whether may he in the reversion recover treble damages, and the place wasted against the tenant for terme of life according to the statute, in conscience as he may by the law, if the stranger be not sufficient to make recompence for the wast done? D. Is the law cleare in this case, that he in the reversion shall recover against the tenant for terme of life, though that he assented not to the doing of wast? Stu. Yea verily, and yet if the tenant for terme of life had been bounden in an Obligation in a certaine summe of money that he should do wast, hee should not forfeit his bond by wast of a stranger, and the diversity is this.

It

It hath been ſaid as an ancient Maxime in the law, that tenant by the curteſie & tenant in dower ſhould take the land with this charge, that is to ſay, that they ſhould do no waſte themſelves nor ſuffer none to be done: and when an action of waſt was given after againſt a tenant for terme of life, then was he taken to be in the ſame caſe as to the point of waſt, as tenant by the curteſie and tenant in dower was, that is to ſay, that he ſhould doe no waſt, nor ſuffer none to be done (for there is another Maxime in the law of England, that all caſes like unto other caſes ſhall be judged after the ſame Law as other caſes be) and ſith no reaſon of diverſity can be aſſigned why the tenant for terme of life after an action of waſt was given againſt him, ſhould have any more favour in the law then the tenant by the Curteſie, or tenant in Dower ſhould: therefore he is put under the ſame Maxime as they be that is to ſay, that he ſhall do no waſt, nor ſuffer none to be done: & ſo it ſeemeth that the law in this caſe doth not conſider the ability of the perſon that doth the waſt, whether he be able to make recompence for the waſt or not, but the aſſent of the ſaid tenants whereby they have wilfully taken upon them the charge to ſee that no waſt ſhall be done. D. I have heard that if houſes of theſe tenants bee deſtroyed with ſuddain tempeſt, or with ſtrange enemies, that they ſhall not be charged with waſt. S. Truth it is. Do. And I thinke the reaſon is becauſe they can have no recobery over. S. I take not that for the reaſon, but that it is an old reaſonable Maxime in the Law that they ſhould

be discharged in these cases, howbeit some will say that in these cases the law of reason doth discharge them: and therefore they say, that if a stat. were made that they should be charged in these cases of wast that the statute were against reason & not to be observed: but yet nevertheless I take it not so, for they might refuse to take such estate if they would & if they will take the estate after the law made, it seemeth reasonable that they take it with the charge & with the condition that is appointed thereto by the Law, though hurt might follow to them afterward thereby: for it is oftentimes seen in the law, that the law doth suffer him to have hurt without helpe of the law, that will wilfully run into it of his owne act not compelled thereto, and adjudgeth it his folly so to run into it, for which folly he shall be also many times without remedy in conscience. As if a man take land for terme of life, and bindeth himselfe by Obligation that he shall leave the land in as good case as he found it, if the houses be after blown downe with tempest or destroyed with strange enemies, as in the case that thou hast put before, he shall be bound to repaire them, or else he shall forfeit his Obligation in law and conscience: because it is his owne act to bind him to it, and yet the Law would not have bound him thereto, as thou hast said before. So me thinketh that the cause why the said tenants bee discharged in the law in an action of wast, when the houses be destroyed by sudden tempest, or by strange enemies, is by a speciall reasonable maxime in the law whereby they be excepted from the other generall bond

before

before rehearsed, that is to say, they shall at their perill see that no wast shall be done, and not by the law of reason: & such there is no maxime in this case to helpe this tenant, ne that he cannot be holpen by the law of reason, it seemeth that he shall be charged in this case by his owne act both in law and conscience, whether the stranger be able to recompence him or not. D. I doubt in this case whether the maxime that thou speakest of be reasonable or not, that is to say, that tenants by the curtesie and tenants in dower were bound by the common law, that they should do no wast themselves, and over that at their peril to see that no wast should be done by no other: for that law seemeth not reasonable that bindeth a man to an impossibility. And it is impossible to prevent that no wast shall be done by strangers: for it may be suddainly done in the night, that the tenants can have no notice of, or by great power that they be not able to resist, and therefore me thinketh they ought not to be charged in those cases for the wast, without they may have good remedy over, and then percase the said maxime were sufferable, & else me thinketh it is a maxime against reason. St. As I have said before, no man shall be compelled to take the land upon him, but he that will take the land, & if he will take the land, it is reason he take the charge as the Law hath appointed it: and then if any hurt grow to him thereby, it is through his owne act and his own assent, for he might have refused the lease if he would. D. Though a man may refuse to take estate for terme of life, or for terme of years, and a woman may refuse

to take her Dower, yet tenant by the curtesie cannot refuse to take his estate, for immediatly after the death of his wife, the possession abideth still in him by the act of the law without entry: & then I put the case that after the death of his wife he would waive the possession, and after Wast were done by a stranger, whether thinkest thou that hee should answer to the Wast? I think he should by the law. D. And how standeth that with reason, seeing there is no default in him? St. It was his default, and at his owne perill that he would marry an inheritrix: whereupon such danger might follow. D. I put case that he were within age at the marriage, or that the land descended to his wife after he married her. S. There thou moves a farther doubt then the first question is: and though it were as thou saist, yet thou canst not say, but that there is as great default in him, as is in him in the reversion, and that there is as great reason why hee should bee charged with the wast, as that he in the reversion should be disherited and have no manner of remedy, neyther no profit of the land as the other hath. & though the said Maxime may be thought very straite to the said tenants, yet it is for to be favoured as much as may be reasonably. because it helpeth much the common wealth: for it hurteth the commonwealth greatly, when woods and houses be destroyed: and if they should answer for no wast, but for wast done by themselves that might be wast done by strangers, by commandement, or assent in such reprovable manner, that they in the reversion should never have profit

of

of their assent. Do, I am content thine opinion stand for this time, and I pray thee now proceed to another question.

§ The fourth question of the Student.

Chap. 5.

IF he that is the very heire be certified by the ordinary bastard, & after bring an action as heire against another person: whether may any man knowing the truth, be of counsell with the tenant and plead the said certificat against the demandant by conscience or not? D. Is the law in this case that all other against whom the demandant hath title shall take advantage of this certificat, as well as he at whose suite he is certified bastard? S. Yea verily, & that for two causes, whereof the one is this. There is an old Maxime in the law that a mischiefe shall be rather suffered then an ill convenience: & then in this case if another writ should afterward be sent to another Bishop in another action, to certifie whether he were bastard or not, peradventure the Bishop would certifie that he were mulier, that is to say, lawfully begotten, & then he should recover the heire, & so he should in one selfe court be taken as mulier and bastard: for avoiding of which contrariosity, the law will suffer no more writs to goe forth in that case, & suffereth also all men to take advantage of the certificate, rather then to suffer such a contradiction in the Court, which in the law is called an Inconvenience: & the other cause is, because

this certificat of the bishop, is the highest triall that is in the law in this behalfe but this is not understood, but where bastardy is laid in one that is party to the writ: for if bastardy be laid in one that is a stranger to the writ, as if douchee pray in aid or such other, then that bastardy shall be tried by 12. men, by which triall he in whom the bastardy is laid, shall not be concluded, because he is not privy to the triall, & may have no attaint, but he that is party to the issue may have attaint, and therefore he shall be concluded, and none other but he: & forasmuch as the said Maxime was ordained to eschew an inconvenience (as before appeareth) it seemeth that every man learned, may with conscience plead the said certificate for avoiding thereof, and give counsell therein to the party according unto the Law, for else the said inconvenience must needs follow. But yet nevertheless I do not meane thereby, that the party may after, when he hath barred the demandant by the said certificat, retaine the land in conscience by reason of the said certificat: for though there be no Law to compell him to restore it, yet I thinke well that he in conscience is bound to restore it, if he knew that the demandant is the very true heire, whereof I have put divers cases like in the 17. Chapter of the first Dialogue in Latin, but my intent is that a man learned in the Law in this case and other like, may with conscience give his counsell according to the law, in avoiding of such things as the law thinketh should for a reasonable cause be eschewed. D. Though hee that doth not know whether he bee bastard

or

or not may give his counsell, and also plead the said certificat: yet I think that he that doth know himselfe to be the very true heire may not plead it, and that is for two causes, whereof the one is this: Every man is bound by the law of reason to do as he would be done to, but I think that if he that pleadeth that certificat were in like case, he would think that no man knowing the certificat to be untrue, might with conscience plead it against him, wherefore no more may hee plead it against none other: The other cause is this, although the certificat be pleaded, yet is the tenant bound in in conscience to make restitution thereof, as thou hast said thy selfe, and then in case that he would not make restitution, then he that pleadeth the plee, should run thereby in like offence, for he hath holpen to set the other man in such a liberty that hee may choose whether hee will restore the land or not, and so he should put himselfe to ieopardy of another mans conscience. And it is written Eccleſiaſt. 3. Qui amat periculum peribit in illo, that is hee that wilfully will put himselfe in jeopardy to offend, shall perish therein. And therefore it is the surest way to eschew perils, for him that knoweth that he is heire, not to plead it. And as for the inconvenience that thou saist must needs follow, but the Certificate be pleaded: As to that it may be answered, that it may bee pleaded by some other that knoweth not that he is very heire, & if the case be so far put that there is none other learned there but hee then me thinketh that he shall rather suffer the said incon-

inconvenience, then to hurt his owne conscience: for alway charity beginneth at himselfe, and so every man ought to suffer all other offences rather then he himselfe would offend. And now that thou knowest mine opinion in this case, I pray thee proceed to another question.

The fifth question of the Student. Chap. 6.

WHether may a man with conscience be of counsel with the plaintife in an action at the common law knowing that the defendant hath sufficient matter in conscience whereby he may be discharged by a Subpœna in the Chancery which he cannot plead at the common law, or not? Do. I pray thee put a case thereof in certaine, for else the question is very general. S. I will put the same case that thou puttest in our first Dialogue in Latin the 10 chap. that is to say: If a man bound in an Obligation pay the money, and take no acquittance, so that by the common law he shall be compelled to pay the money againe, for such consideration, as appeareth in the 15. chap of the said Dialogu where it is shewed evidently how the law in that case is made upon a good reasonable ground much necessary for all the people howbeit, that a man may sometime through his owne default take hurt thereby, wherein I pray thee shew me thine opinion. D. This case seemeth to be like to the case that thou hast next before this: that he that knoweth the payment to be made doth not as he would be done to, if he give counsel that an action should bee taken to have it payd a-

gain.

gaine. St. If he be ſworne to give counſell according to the law, as Serjeants at the Law doe, it ſeemeth he is bound to give counſell according to the Law, for elſe he ſhould not performe his oath. Doct. In theſe words (according to the law) is underſtood the law of God, and the law of reaſon, aſwell as the law & cuſtomes of the realme; for as thou haſt ſaid thy ſelfe in our firſt dialogue in latin, that the law of God, and the law of reaſon, be two ſpeciall grounds of the laws of England, wherefore (as me thinketh) he may give no counſell (ſaving his oath) neither againſt the law of God, nor the law of reaſon. And certaine it is that this article, that is to ſay, that a man ſhal do as he would be done to, is grounded upon both the ſaid laws. And firſt that it is grounded upon the law of reaſon it is evident of it ſelfe. And in the 6. Chapter of Saint Luke, it is ſaid, Et prout vultis ut faciant vobis homines, & vos facite illis ſimiliter, that is to ſay, All that other men ſhould do to you, do you to them, & ſo it is grounded upon the Law of God: wherefore if he ſhould give counſell againſt the defendant in that caſe, he ſhould doe againſt both the ſaid laws. St. If the defendant had no other remedy but the common law, I would agree well it were as thou ſaiſt, but in this caſe he may have good remedy by a Subpœna, and this is the way that ſhall induce him directly to his Subpœna, that is to ſay, when it appeareth that the Plaintife ſhall recover by Law. Doct. Though the defendant may be diſcharged by Subpœna, yet the bringing in of his proofes there, will be to the charge

of

of the defendant, and also the prookes may die ere they come in. Also there is a ground in the law of reason, Quod nihil possimus contra veritatem, (that is) we may do nothing against the truth, and sith he knoweth it is truth that the mony is paid, he may do nothing against the truth, and if he should be of counsell with the plaintife, he must suppose and averre that it is the very due debt of the plaintife, and that the defendant withholdeth it from him unlawfully, which he knoweth himselfe to be untrue: wherefore he may not with conscience in this case be of counsell with the plaintife, knowing that the plaintife is paid already, wherefore if thou be contented with this answer, I pray thee proceed to some other question. St. I will with good will.

§ The seventh question of the Student.

Chap. 7.

A Man maketh a feoffement to the use of him and of his heires, & after the feoffor putteth in his beasts to manure the ground, & the feoffee taketh them as damages feasant, and putteth them in pound, and the feoffor bring an action of trespasse against him for entring into his ground &c. whether may any man knowing the said use bee of counsell with the feoffee to avoid the action? D. May he by the common law avoid that action seeing that the feoffor ought in conscience to have the profits? S. Yes verily, for as to the common Law the whole interest is in the

the feoffee, and if the feoffee will breake his conscience, and take the profits, the feoffor hath no remedy by the common law, but is driven in that case to sue for his remedy, by Subpœna for the profits, and to cause him to reenoffee him againe, & that was sometime the most common case where the Subpœna was sued, that is to say, before the Statute of R 3. but sith the statute the feoffor may lawfully make a feoffement. But nevertheless for the profits received, the feoffor hath yet no remedy but by Subpœna as he had before the said statute. And so the suppose of his action of trespass is untrue in every point, as to the common law.

D Though the action be untrue, as to the law yet hee that sueth it ought in conscience to have that he demandeth by the action, that is to say, dammages for his profits, and as it seemeth no man may with conscience give counsell against that he knoweth conscience would have done. S. Though conscience would hee should have the profits, yet conscience will not that for the attaining thereof the feoffor should make an untrue surmise. Therefore against the untrue surmise every man may with conscience give his counsell, for in that doing he resisteth not the plaintife to have the profits, but he withstandeth him that he should not maintaine an untrue action for the profits. And it sufficeth not in the Law, ne yet in conscience as me seemeth, that a man hath right to that he sueth for, but that also hee sue by a just meanes, and that hee hath both good right, and also a good and a true conveiance to come to his right: for

it

if a man have right to lands, as heire to his father, and he will bring an action as heire to his mother that never had right, every man may give counsell against the action, though he know he have right by an other meanes, and so as me thinketh he may do in dilatories. whereby the party may take hurt if it were not pleaded though he know the plaintife have right, as if the party or the towne be misnamed, or if the degrees in writs of Entre be mistaken, but if the party should take no hurt by admitting of dilatory, there he that knoweth that the plaintife hath right, may not plead that dilatory with conscience: As in a Formedon to plead in Abatement of the writ, because he hath not made himselfe heire to him that was last seised, or in a writ of Right, for that the demandant had omitted one that tended right, ne such other, ne he may not assent to the casting of an essoin, nor protection for him, if he know that the demandant hath right, ne he may not vouch for him except it be that he knoweth that the tenant hath a true cause of avoucher, & of lien, and that he doth it to bring him thereto, and in like wise he may not pray in aid for him unlesse he know the prayee habe good cause of voucher, and lien over, or that he know that the prayee hath somewhat to plead that the tenant may not plead, as villaine in the demandant, or such other. D. Though the plaintife hath brought an action that is untrue and not maintainable in the Law yet the defendant doth wrong to the plaintife in the withholding of the profits aswell before the action brought as hanging the action, and

that

that wrong, as it seemeth, the counsellor both maintaine, & also sheweth himselfe to favour the party in that wrong when he giveth counsell against the action. S^r. If the plaintife doe take that for a favor & a maintenance of his wrong, he judgeth farther then the cause is given, so that the counsellor do no more then give counsell against the action; for though he give him counsell to withstand the action for the untruth of it, and that he should not confesse it, and to make thereby a fine to the King without cause, yet it may not stand with reason that he may give counsell to the party to yeeld the profits: and therefore I think he may in this case be of counsell with him at the common law, and be against him in the Chancery, and in either Court give his counsel without any contrariosity, or hurt of conscience. And upon this ground it is, that a man may with good conscience be of counsell with him that hath land by descent: or by discontinuance without title, if he that hath the right bring not his action according to the law, for the recovering of his right in that behalfe.

§ The seventh question of the Student.

Chap. 8.

If a man take distresse for debt upon an obligation, or upon a contract, or such other thing that he hath right title to have, but that he ought not by the law to distrain for it, & nevertheles, he

keepeth

eth the same distresse in pound till he be paid of his duty, what restitution is he bound to make in this case? whether shall he pay the mony because he is come to it by an unlawfull meanes, or onely to restore the party for the wrongfull taking of the distres, or for neither. I pray you shew me? D. What is the law in this case? S. That he that is distrained may bring a special action of trespass against him that distraineth, for that he tooke his beast wrongfully, & kept them till he made a fine, & therefore he shall recover the fine in damages, as he shall doe for the residue of trespass: for the taking of the money by such compulsion is taken in law but as a fine wrongfully taken, though it be his duty to have it. D. Yet though he may so recover, me thinketh that as to the repaiment of the mony he is not bound thereto in conscience, so that hee take no more then of right he ought to have, for though hee came to it by an unjust meane, yet when the money is paid him, it is his of right, & he is not bound to repay it unlesse it be recovered as thou saidst, & then when he hath repayed it, he is as me thinketh restored to his first action: but to the redelivery of the beast with such damages & such hurts as he hath by the distres, I suppose he is bound to make recompence of them in conscience without compulsion or suit in the Law: for though he might lawfully have sued for his duty in such manner as the law hath ordred, yet I agree well that he may not take upon him to be his own judge, and to come to his duty against the order of the law, & therfore if any hurt come to the party by the disorder, he is bound to

restore

reſtore it. But I would think it were the more doubt if a man tooke ſuch a diſtreſſe for a treſpaſſe done to him and keepeth the diſtreſſe till amends be made for the treſpas: for in that caſe the damages be not in certaine, but be arbitrable, either by the aſſent of the parties, or by 12. men: & it ſeemeth that there is no aſſent of the party in this caſe, ſpecially no free aſſent, for that he doth it by compulſion, and to have his diſtreſſe againe, and ſo his aſſent is not much to be pondered in that caſe, for all his aſſenting of him that took the diſtreſſe, and ſo he hath made himſelfe his owne Iudge, and that is prohibited in all lawes: but in that caſe where the diſtreſs is taken for debt he is not his own Iudge for the debt was iudged in certaine before by the firſt contract, and therefore ſome think great diverſity betwixt the caſes. St. By that reaſon it ſeemeth, that if he that diſtraineth in the firſt caſe for the debt take any thing for his damages, that he is bound in conſcience to reſtore it again, for damages be arbitrable; and not certaine no more then treſpaſſe is. & me ſeemeth that both in the caſe of treſpaſſe and debt, he is bound in conſcience or reſtore that he taketh, for though he ought in right to have like ſum as he receiveth, yet he ought not to have the money that he receiveth, for he came to the mony by an unjuſt means wherefore it ſeemeth he ought to reſtore it again. D. And if he ſhould be compelled to reſtore it again, ſhould he not yet (for that he received it once) be barred of his firſt action notwithſtanding the payment?

S. I will not at this time cleerely assoile thee that question, but this I will say, that if any hurt come to him thereby, it is though his owne default, for that he would do against the law: but nevertheless a little I will say to thy question, that as me seemeth when he hath repayed the money, that he is restored to his first action. As if a man condemned in an action of trespass pay the money, and after the defendant reverse the judgement by a writ of Erroz, and have his money repayed, then the plaintife is restored to his first action. And therefore if hee that in this case tooke the money, restore that he took by the wrongfull distresse, or that he ordered the matter so liberally, that the other murmur not, ne complaine not at it, me seemeth he did very well to be sure in conscience: and therefore I would advise every man to be well ware how hee distraineth in such cases against the law. D Thy counsell is good, & I note much in this case that the party may have an action of trespass against him that distraineth, so that he is taken in the law but as a wrong doer, & therefore to pay the money againe is the sure way, as thou hast said before. And I pray thee now shew me for what a man may lawfully distrain as thou thinkest.

§ For what thing a man may lawfully distrain.

Chap. 9.

A Man may lawfully distraine for a Rent service, & for all manner of services, as homage

mage, Fealty, Eſcuage, ſuit of Court, reliefes, and ſuch other. Alſo for a rent reſerved upon a gift in tatle, a leaſe for terme of life, for yeeres, or at will, if he reſerve the reverſion, the feoffor ſhall diſtraine of common right, though there be no diſtreſſe ſpoken of, but in caſe a man make a feoffement and that in fee by Indenture reſerving a rent, hee ſhall not diſtraine for that rent unleſſe a diſtreſſe bee expreſſly reſerved: and if the feoffement bee made without a deed reſerving a rent, that reſervation is void in Law, and he ſhall have the rent onely in conſcience, and ſhall not diſtraine for it And like law is where a gift in tatle or a leaſe for terme of life is made, the remainder over in fee reſerving a rent, that reſervation is void in Law.

Alſo if a man ſeiſed of land for terme of life granteth away his whole eſtate, reſerving a rent, that reſervation is void in the law, without it be by Indenture, and if it be by Indenture, yet he ſhall not diſtraine for the rent, but a diſtreſſe be reſerved. Alſo for Amerciaments in a Leete the Lord ſhall diſtraine. But for Amerciament in a Court barron he ſhall not diſtraine

Alſo if a man make a leaſe at Michaelmas for a yeere, reſerving a rent payable at the feaſt of the Annunciation of our Lady and Saint Mich the Archangel in that caſe he ſhall diſtrain for the rent due at our Lady day, but not for the rent due at Michaelmas, becauſe the terme is expired.

But if a man make a Leaſe at the Feaſt of

Christmas for to endure to the feast of Christmas next following, that is to say, for a yeare reserving a rent of the foresaid Feast of the Annunciation of our Lady and Saint Michael the Archangell, there he shall distraine for both the rents as long as the terme continued, that is to say, till the aforesaid feast of Christmas.

And if a man have land for terme of life of John of Noke, and maketh a lease for terme of yeares reserving a rent, the rent is behind, and John of Noke dieth, there he shall not distraine because his reversion is determined.

Also if he to whose use feoffees been seised maketh a lease for terme of yeares, or for terme of life, or a gift intaile reserving a rent, there the reservation is good and the lessor shall distraine

And if a township be amerced & the neighbours by assent assesse a certaine summe upon every inhabitant, and agree that if it be not paid by such a day, that certaine persons thereto assigned shall restraine: In this case the distresse is lawfull. If Lord and Tenant bee, and if the tenant do hold of the Lord by fealty and rent and the Lord doth grant away the fealty reserving the rent, and the tenant attourneth in this case, hee that was Lord may not distrain for the rent, for it is become a rent seeke. But if a man make a gift in tayle to another, reserving fealty and certaine rent, and after that hee granteth away the fealty reserving the rent and the reversion to himselfe, in this case he shall distraine for the rent, for the grant of the fealty

fealty is void, for the fealty cannot be severed from the reversion. Also for heriot service the Lord shall distraine, and for heriot custome he shall seise and not distraine. Also if rent be assigned to make a partition or assignement of Dower egall, he or she to whom the rent is assigned may distraine: and in all these cases abovesaid, where a man may distraine, he may not distrain in the night, but for damages feasant, that is to say, where beast do hurt in his ground he may distraine in the night. Also for wastes, for reparations, for accompts, for debts upon contracts, or such other, no man may lawfully distraine.

§ The eight question of the Student.

Chap. 10.

If a man do trespasse, and after make his executors, and die before any amends made: whether be his executors bound in conscience to make amends for the trespasse if they have sufficient goods thereto, though there be no remedy against them by the law to compell them to it? Do. It is no doubt but they are bound thereto in conscience, before any other deed in charity, that they may do for him of their owne devotion. St. Then would I wit, if the testator made Legacies by his will, whether the Executors be bound to doe first, that is to say, to make amends for the trespasse, or to pay the Legacies in case they have no goods to do both? D. To pay legacies: for if they should first

make recompence for the Trespasse and then have not sufficient to pay the Legacies, they should be taken in the Law as wasters of their testators goods: for they were not compellable by no law to make amends for the trespasse, because every trespass dyeth with the person, but the Legacies they should be compelled by the law spirituall to fulfill, and so they should be compelled to pay their Legacies of their owne goods and they shall not be compelled thereto by no law ne conscience: but if the case were that he leave sufficient goods to do both, then me thinketh they be bound to do both, and that they be bound to make amends for the Trespasse, before they may do any other charitable deed for the Testator of their own mind, as I have said before, except the funerall expences that be necessary, which must be allowed before all other things. S. And what the proving of the Testament.

D. The Ordinary may nothing take by conscience therefore, if there be not sufficient goods besides for the funerals, to pay the debts and to make restitution. And in like wise the Executors be bound to pay debts upon a simple contract, before any other deed of charity, that they may for their Testator of their owne devotion, though they shall not be compelled thereto by the Law. S u. And whether thinkest thou that they be bound to do first, that is to say, to make amends for the trespasse, or to pay the debts upon a simple contract. D. To pay the debts, for that is certaine and the trespasse is arbitrable.

S. Then

S. Then for the plainer declaration of this matter and otherlike, I pray thee shew me thy mind, by what law it is, that if a man make executors, and that the executors, if they take upon them, be bound to performe the will, and dispose the goods that remaine for the Testator. I think that it is best by the Law of reason. St. And me thinketh that it should bee rather by the custome of the Realme. Do. In all Countries and in all lands they make Executors. S. That seemeth to be rather by a generall custome, after that the law and custome of property was brought in, then by the law of reason: for as long as all things were in common, there were no Executors ne Wills, ne they needed not them, and when property was after brought in, me thinketh that yet making of executors, and disposing of goods by will, after a mans death, followeth not necessarily thereupon, for it might have bin made for a law, that a man should have had the property of his goods onely during his life, and that then his debts paid all his goods to have been left to his wife and children, or next of his kinne, without any legacies making thereof, and so might it now be ordained by statute, and the statute good and not against reason. Wherefore it appeareth that executors have no authority by the law of reason but by the law of man. And by the old Law and custome of the Realme a man may make Executors and dispose his goods by his Will, and then his Executors shall have the execution thereof, and his heires shall have nothing, but if any particular customs helpe: and

the executors shall also have the whole possession and disposition of all his goods and chattels aswel reall as personall, though no word be expressly spoken in the will, that they shall have them: and they shall have also actions to recover all debts due to the testator, though all debts and legacies of the testator be paid before, and shall have the disposition of them to the use of the testator, and not to their owne use: & so me thinketh that the authority to make executors, and that they shall dispose the goods for the testator is by the custome of the Realm: but then I think as thou saist, that by the law of God they shall be bound to doe the first, that is, to the most profit of the soule of their testator where the disposition thereof is left to their discretion, and that I agree well is to pay debts upon contracts, and to make amends for wrong done to the testator, though they be not compelled thereto by the law and custome of the realm, if there be none other debt nor legacy that they be bound to pay by the law: but if two several debts be payable by the law, then which debt they shall doe first in conscience, I am somwhat in doubt. D. Let us first know what the common law is therein S. The common law is that if the Testator owe mony to two men severally by Obligation, or by such other manner that an action lyeth against his Executors thereof by the Law, and he leaveth goods to pay the one and not both, that in that case he that can first obtaine his Judgement against the Executors, shall have execution of the whole, and the other shall have nothing, but to which of them

them he shall in conscience owe his favour, the common Law teacheth not. D. Therein must be considered the cause why the debts began, & then he must after conscience beare his lawfull favour to him that hath the cleerest cause of debt, and if both have like cause, then in conscience he must beare his favour where is most need, and greatest charity.

St. May the executors in that case delay that action that is first taken, if it stand not with so good conscience to be payed, as another debt whereof no action is brought, and procure that an action may be brought therefore, and then to confesse that action, that he may so have execution, and then the executors to be discharged against the other? D. Why may he not in that case pay the other without action, and so be discharged in the law against the first?

St. No verily, for after an action is taken the executor may not minister the goods so, but that he leave so much as shall pay the debt, whereof the action is taken: and if he do not, he shall pay it of his owne goods, except an other recover, and have judgement against him hanging that action, and that without coyn.

D. Then to answer to thy question, I think that by delates that be lawfull, as by Essoine, Emparlance, or by delatory plee in abatement of the writ that is true, he may delay it: but he may plead no untrue plee to preferre the other to his duty. But I pray thee, what is the law of legacies, restitution, and debts, upon contracts, that perteine ought rather after charity

to

to be paid then a debt upon an obligation. What may the favour of the Executor doe in these cases? St. Nothing, for they either performe legacies, make restitutions, or pay debt upon contracts, and keepe not sufficient to pay debts which they are compelled by the Law to pay, that shall be taken as a Devastaverunt bona testatoris, that is to say, That they have wasted the goods of their testator: and therefore they shall be compelled to pay the debts of their owne goods: & so it is if they pay a debt upon an obligation, whereof the day is yet to come, though it be the cleere debt, and that bee the more charity to have it paid. D. Yet in that case if he to whom the debt is already owing, forbeare till after the day of the other obligation is past, then he may pay him without danger S. That is true if there be no action taken upon it, and though ther be, yet if that action may be delayed by lawfull meanes as thou hast spoken before, till after the day, and that an action is taken upon it, then may the Executors confesse the action, and then after Judgement he may pay the debt without danger of the Law D. Is not that confession of the action so done of purpose a covin in the law? S. No verily for covin is where the action so untrue & not where the executors bear a lawfull favor, D The Ordinary upon the accompt in all the case before rehearsed, will regard much what is best for the testator S. But he may not prive them to accompt against the order of the common Law.

The

§ The ninth question of the Student.
Chap. 11.

A Man is indebted unto another upon a simple contract in 20. l. and he maketh his will and bequeatheth 20 l. to H. Hart and dyeth, and leaveth goods to his executors onely to bury him with, and to performe the said Legacy, and after the said Executors deliver the goods of their Testator in performance of the said bequest: whether is hee to whom the bequest is made, bound in conscience to pay the said debt upon the simple contract, or not? Do. Is he not bound thereto by the Law? Stu. Verily. Do. And what thinkest thou hee is in conscience? S. I think that he is not bound thereto in conscience, for hee is neither Ordinary, Administrator, nor Executor. And I have not heard that any man is bound to pay debts of any man that is deceased, but hee be one of those three: for the goods that the Testator left to the Executors were never charged with the debt, but the person of the Testator while he lived was onely charged with the debt and not his goods, and his Executors that represent his estate after his death, having goods thereto of the Testators, be charged, also with the debts, and not the goods. And therefore if an Executor give away or sell all the goods of the Testator, or otherwise waste them hee that hath the goods is not charged with the debts in Law nor conscience, but the Executor shall bee charged of his owne goods

goods. And in like wise if Io. at Noke owe to A. B. 20 l. & C. B. oweth to C. D. 20 l. and after A. B. dyeth intestate having none other goods but the said 20 l. which the said Iohn at Noke oweth him, yet the said C. D. shall have no remedy against the said Io. at Noke, for he standeth not charged to him in Law nor conscience. But the Ordinary in this case must commit Administration of the goods of the said A. B. And the said Administrator must levy the money of the said Iohn at Noke, and pay it to the said C. D. and the said Iohn at Noke shall not pay it himselfe, because he is not charged therewith to him: and no more me thinketh in this case, that he to whom the bequest is made is, neither charged to him that the money was owing to, in the Law or conscience. Doct. Then shew me thy mind by what Law it was grounded as thou thinkest that Executors be bound to pay debts before legacies: whether it is by the law of God or by the Law of reason or by the law of man, as thou thinkest? S. I think that it is both by the law of reason, & by the law of God: for reason will that they shall do first that is best for the testator, and that is to pay debts that their testator is bound to pay, before legacies, that he is not bound to. And also by the law of God, they are bound to pay the debts first: for such they are bound by the Law of God to love their neighbour, they are bound to do for him that shall be best for him, when they have taken the charge thereto as Executors doe when they agree to take the charge of the will of their Testator

upon

upon them: and it is better for the testator that his debt be paid (wherefore his soule shall [suffer paine) then that his legacies be performed, wherefore he shall suffer no paine for the performing of them.

And that is to be understood, where the Legacie is made of his own free will, & not where it is made as a satisfaction of any duty. And after the saying of St. Gregory, the very true proofe of love is the deed. But this man is not in that case, for hee tooke never the charge upon him to pay the debts of the Testator, and therefore he is not bound to them in Law nor conscience as me seemeth: but rather the executors should have been ware ere they had paid the legacies, seeing there were debts to pay.

D. The Executors might no otherwise have done in this case, but to pay the Legacies: for then they should have bin compelled by the Law to have payd, and so they could not have been to have payd the debt upon a contract, and [therefore they did well in performing of that legacie; but he to whom the legacy was made ought not to have taken them, but ought in conscience to have suffered them, to have gone to the payment of the debt, and sith he did not so, but took them where he had no right to them, it seemeth that when he tooke them, he tooke with them the charge in conscience to pay the debt: for sith the executors were compellable by the Law to performe that bequest and not pay the debt, therefore when they performed that bequest, they were discharged thereby against him that the debt was owing to, in the Law and conscience

science, and then the charge resteth upon him that tooke the goods where he ought not in conscience to have taken them: but if it had been a debt upon an Obligation, or such other debt, whereupon remedy hath been had against the executors by the Law, I there suppose though that the Executors had performed the legacie, that yet he to whom the legacie was made and performed, had not been charged in conscience to the payment of the debt, for the Executors stood still charged thereto of their own goods: and he to whom the bequest was made was onely bound in conscience to repay that he received to the Executors, because he had no right to have received it, for against the Executors hee had no right thereto. Sto. Then it seemeth in this case that in like wise he to whom the bequest was made, should repay that he received, to the Executors and then they to pay it rather then he. D. The Executors have no farther medling with it as this case is, for when they performed the bequest, they were discharged against both the other in Law and conscience, and also he to whom the bequest was made, stood not in this case charged to the Executors: for against them he had good title by the Law, and so this charge stands not onely against him that the debt is owing to: and the same Law that is in this case upon a debt upon a contract is if the testator had done a trespasse whereupon he ought to have made restitution, that is to say, that he to whom the bequest is made, is bound to make the amends for the Trespasse: for it should be no discharge to him to

pay

pay it again to the Executors without they paid it ouer, and it were uncertaine to him whether they should pay it or not.

And therefore to be out of perill, it is necessary that he pay it himselfe, and then he is surely discharged against all men.

§ The tenth question of the Student.

Chap. 12.

A Man seised of certaine land in his demesne as of fee, hath issue two sonnes and dieth seised, after whose death a stranger abateth, and taketh the profits: after the eldest son dieth without issue, and his brother bringeth an Assise of Mordancester as sonne and heire to his father, not making mention of his brother, and recovereth the land with damages from the death of his father, as he may well by the Law: whether in this case is the younger brother bound in conscience, to pay the Executor of the eldest brother, the value of the profits of the said land, that belonged to the eldest brother in his life or not? D. What is thine opinion therein? S. That like as the said profits belonged of right to the eldest brother in his life, and that he had full authority to have released aswell the right of the said land, as of the said profits, which release should have been a cleere barre to the younger brother for ever: That the right of the said damages which

which be in the law but a chattell, belong to his Executors and not to the heire: for no manner of chattell neither reall nor personall shall not after the law of the realm descend unto the heire.

Do. Thou saidst in the case next before, that it is not of the Law of reason, that a man shall make Executors and dispose of his goods by his will, & that the executors shall have the goods to dispose, but by the Law of man: and if it be left to the determination of the law of man, That in such cases as the law giveth such chattels unto the Executors, they shall have good right unto them, and in such cases as the law taketh such chattels from them, they beene rightfully taken from them: and therefore it is thought by many, that if a man shew a Writ of right of Ward of a Ward that hee hath by his owne fee: and dieth hanging the writ, and his heire sue a Resummons according to the Stat. of West. second, and recovereth: that in that case the heire shall enjoy the wardship against the Executors, and yet it is but a chattell: and they take the reason to bee, because of the said statute, and so might it be ordained by statute that all Wards should goe to the heires and not to the Executors: Right so in this case, sith the Law is such, that the younger brother shall in this case have an Assise of Mortdancester an heire to his father, not making any mention of his elder brother, and recover damages aswell in the time of his brother, as in his owne time: It appeareth that the law giveth the right of these dammages to the heire, and therefore

for no recompence ought to be made to the executors as me seemeth & it is not like to a writ of Aiel. where as I have learned in latin (sith our first Dialogue) the demandant shall recover damages onely from the death of his father, if hee overlive Aiel: and the cause is, for that the demandant, though his Aiel overlived his father, must of necessity make his conveyance by his father, and must make himselfe son and heire to his father, and cousin & heire to his Aiel: and therefore in that case if the father overlived the Aiel, the abator were bounden in conscience to restore to the executors of the father the profits run in his time (for no law taketh them from him) but otherwise it is in this case, as me seemeth. Sr. If the younger brother in this case had entred into the land without taking any assise of Mordancester as hee might if hee would, to whom were the abator then bounden to make restitution for those profits as thou thinkest? D. To the executors of the eldest brother: or in that case there is no law that taketh them from them. & therefore the generall ground, which is that all chattels shall goe to the executors, holdeth in that case: but in this case that ground is broken and holdeth not, for the reason that I have made before. For commonly there is no generall ground in the Law so sure, but it faileth in some particular case.

§ The eleventh question of the Student.

Chp. 13.

A Man seised of land in fee, taketh a wife, & after alieneth the land, & dyeth, after whose

death his wife asketh her dower, and the alienee refuseth to assigne it unto her, but after she asketh her dower againe, and he assigneth it unto her: whether is the alienee in this case bound in conscience, to give the woman damages for the profits for the land after the third part, from the death of her husband, or from the first request of her dower, nor neither the one nor the other. D. What is the law in this case? S. By the law the woman shall recover no damages; for at the common Law the demandant in a writ of dower, should never have recovered damages: but by the Statute of Merton it is ordained, that where the husband dyeth seised, that the woman shall recover damages, which is understood the profits of the land sith the death of her husband, and such damages as she hath by the forbearing of it: but in this case the husband dyed not seised, wherefore she shall recover no damages by the law. D. Yet the law is that immediately after the death of her husband the wife ought of right to have her dower if she aske it, though her husband die not seised. S. That is true.

Doct. And sith she ought to have her dower from the death of her husband, it seemeth that she ought in conscience to have also the profits from the death of her husband, though she have no remedy to come to them by the Law: For mee thinketh that this case is like to a case that thou puttest in our first Dialogue in Latin, the 17. Chapter; That if a tenant for terme of life be disseised and dye, and the disseisor dyeth, and his heire entreth and taketh the profits,

fits, and after hee in the reuersion recouereth the lands against the heire, as he ought to do by the law, that in that case hee shall receiue no damages by the Law: and yet thou diddest agree, that in that case the heire is bound in conscience to pay the dammages to the demandant, and so me thinketh in that case, that the feoffee ought in conscience to pay the dammages from the death of her husband, seeing that immediately after his death she ought to haue her dower. S. Though she ought to be indowed immediately after the death of her husband, yet shee can lay no default in the feoffee till she demand her dower upon the ground, and that the tenant be not there to assigne it, or if he be there that he will not assigne it: for he that hath the possession of land whereunto any woman hath title of dower, hath good authority as against hee to take the profits til she require her dower, for every woman that demandeth dower affirmeth the possession of the tenant as against her. and therefore although she recouer by action, shee leaueth the reuersion alway in him against whom she recouereth, though he be a disseisor, and bringeth not the reuersion by her recouery to him that hath right as other tenants for terme of life doe. And for this reason it is that the tenant in a Writ of Dower, where the husband dyed seised, if hee appeare the first day, may say to excuse himselfe of damages, that he is and all times hath been ready to yeld Dower if it had been demanded: and so he shall not be received to do in a Writ of Cosinage, neither in the case that thou remembrest

abobe, for in both cases the tenants be supposed by the writ to be wrong doers: but it is not so in this case: some thinketh it cleere that the feoffee in this case shall never be bound by law nor conscience to yeeld damages for the time that passed before the request, but for the time after the request is greater doubt: howbeit some think him there not bound to yeeld damages, because his title is good, as is said before, & that it is her default that she brought not her action. D. As unto the time before the request, I hold me content with thine opinion, so that he assign the dower when he is required. but when he refuseth to assigne it, then I think him bound in conscience to yeeld damages for both times though she shall none recover by the law. And first as for the time after the refusall, it appeareth evidently that when he denieth to assigne her dower he did against conscience: for he did not that he ought to have done by the law, nether he would should have been done to him, & so after the request he holds her dower from her wrongfully, and ought in conscience to yeeld damages therefore. And as to the default that thou assignest in her, that she took not her action, that forceth little, for actions need not but where the party will not do that he ought to do of right. And for that he ought of right to have done and did it not, he can take no advantage: and then as to the damages before the request, me thinketh him also bounden to pay them; for when he was required to assigne dower and refuseth, It appeareth that he never intended to yeeld dower from the beginning & so he is a wrong doer in his own con-

conſcience: & moreouer if the husband die ſeiſed, the law is ſuch, that if the tenant refuſe to aſſigne dower when he is required wherefore the woman bringeth a writ of dower againſt him, that in that caſe the woman ſhall recouer damages aſwell for the time before the requeſt as after: and yet he ought not in that caſe after thine opinion to haue yeelded any manner of damages if he had bin ready to aſſign dower when it was demanded as ſome thinketh here. S The cauſe in the caſe that thou haſt put, is for that the ſtatute is generall that the demandant ſhall recouer damages, where the husband dyed ſeiſed, and that ſtat. hath been alway conſtrued, that where the tenant may not ſay, that he is and hath been ready alway to yield dower, &c. that the demandant ſhall recouer damages from the death of her husband But in that caſe there is no law of the realm, that helps for the demandant, neither common law nor ſtat & furthermore though it might be proued by his refuſall, that he neuer intended from the death of the husband to aſſign her dower, yet that proueth not but that he had good right to take the profits of her third part for the time, aſwell as he had of his own two parts, till requeſt be made, as is aforeſaid: & ſo me thinketh that notwithſtanding the denial he is not bound to yeeld damages in this caſe, but for the time of the requeſt, and not for the time before. D. For this time I am content with thy reaſon.

§ The twelfth queſtion of the Student.

Chap. 14.

A Man ſeiſed of certain lands knowing that another hath good right & title to them, le-

with a fine with Proclamation, to the intent he would extinct the right of the other man and the other man maketh no claime within the v. yeares, whether may he that levied the fine hold the land in conscience as he may do by the law? D. By this question it seemeth that thou doest agree that if he that levied the fine had no knowledge of the other mans right, that his right should then be extincted then by the fins in conscience. S. Yea verily, for thou diddest shew a reasonable cause why it should be so in our first Dialogue in Latin, the 24. Chapter, as there it appeareth. But if he that levied a fine and that would extinct the right of another knew that the other had more right then hee, then I doubt therein: for I take thine opinion in our first Dialogue to be understood in conscience. Where he that would extinct former rights by such a fine with proclamation, knoweth not of any former title but for his more surety, if any such former right be, he taketh the remedy that is ordained by the law D. Whether dost thou meane in this case that thou puttest now that he that hath right, knoweth of the fine, wilfully letting the five yeares passe without claime, or that he knoweth not any thing of the fine.

S. I pray thee let mee know thine opinion in both cases, and whether thou thinke that hee that hath right be barred in either of the said causes by conscience as he is by the Law, or not. Doct. I will with good will hereafter shew thee thy mind therein: but at this time I pray thee give a little sparing and proceed

now

now for this time to some other question.

The thirteenth question of the Student.

Chap. 15.

A Man seised of certaine lands in fee hath a daughter, which is his heire apparant the daughter taketh a husband, and they have issue, the father dyeth seised, and the husband assoone as he heareth of his death, goeth toward the land to take possession and before he can come there, his wife dyeth, whether ought he to have the land in conscience for terme of his life, as tenant by the curtesie, because he hath done that in him was to have had possession in his wives life, so that he might have been tenant by the curtesie according to the Law, or that he shall neither have it by the Law, nor conscience? D. Is it cleerely holden in the law that he shall not bee tenant by the curtesie in this case, because he had not possession in deed?

S. Yea verily, and yet upon a possession in law a woman shall have her dower, but no man shall be tenant by the curtesie of land, without his wife have possession in deed. D. A man shall be tenant by the curtesie of a rent though his wife dye before the day of payment, and in like wise of an Advowson though shee dye before the avoidance. S. That is truth, for the old custom and Maxime of the law is, that he shall be so, but of land there is no Maxime that serveth him but his wife have possession in deed. D. And what is the reason that there is such a Maxime in the

law of the rent & of the Advowson, neither then of land when the husband doth as much as in him is to have possession and cannot? S. Some assigne the reason to be, because it is impossible to have possession in deed of the rent: or of advowson before the day of payment of the rent, or before the avoidance of the advowson. D. And so it is impossible that he should have possession in deed of land if his wife dye so soone that he may not by possibility come to the land after his fathers death, and in her life as the case is. S. The law is such as I have shewed thee before, & I take the very cause to be, for that there is a Maxim set both for the rent and the advowson, and not for the lands, as I have said before, and as is said in the 8. chapter of our first Dialogue, it is not alway necessary to assigne a reason or consideration why the Maximes of the Law of England were first ordained & admitted for Maximes, but it sufficeth that they have been alway taken for law, & that they be neither contrary to the law of reason, nor to the law of God, as this Maxime is not, and therefore if the husband in this case be not holpen by conscience he cannot be holpen by the law D. And if the law helpe him not, conscience cannot help him in this case, for conscience must alway be grounded upon some law, and it cannot in this case be grounded upon the Law of reason, nor upon the Law of God, for it is not directly by those lawes that a man shall be tenant by curtesie, but by the custome of the realm. And therefore if the custome helpe him not, he can nothing have in this case by conscience: for conscience neber

neyther resisteth the law of man, nor addeth nothing to it, but where the law of man is in it self directly against the Law of reason, or else the Law of God, and then properly it cannot be called a Law, but a corruption, or where the generall grounds of the Law of man worke in any particular case against the said Lawes, as it may do, and yet the law good, as it appeareth in divers places in our first dialogue in Latin, or else, where there is no law of man provided for him that hath right to a thing by the law of reason or by the law of God. And then sometime there is remedy given to execute that in conscience, as by a Subpœna, but not in all cases: for sometime it shall be referred to the conscience of the party, and upon this ground (that is to say that where there is no title given by the common Law, that there is no title by conscience: There be divers other cases, whereof I shall put some for an example. As if a Reversion bee granted unto one, but there is no attornement: or if a new rent be granted by word without deed, there is no remedy by conscience, unlesse the said grants were made upon consideration of money or such other. And in like wise where he that is seised of lands in Fee-simple maketh a will thereof, that will is void in conscience, because the ground serveth not for him whereby the conscience should take effect, that is to say, the law. And if the tenant make a feoffement of the land that he holdeth by priority, & taketh estate againe, and dyeth (his heire within age) the Lord of whom the land was first holden by priority, shall have no remedy, for the body by con-

law of the rent & of the Advowson, neither them of land when the husband doth as much as in him is to have possession and cannot? S. Some assigne the reason to be, because it is impossible to have possession in deed of the rent: or of advowson before the day of payment of the rent, or before the avoidance of the advowson. D. And so it is impossible that he should have possession in deed of land if his wife dye so soone that he may not by possibility come to the land after his fathers death, and in her life as the case is. S. The law is such as I have shewed thee before, & I take the very cause to be, for that there is a Maxim serveth for the rent and the advowson, and not for the lands, as I have said before, and as is said in the 8. chapter of our first Dialogue, it is not alway necessary to assigne a reason or consideration why the Maximes of the Law of England were first ordained & admitted for Maximes, but it sufficeth that they have been alway taken for law, & that they be neither contrary to the law of reason, nor to the law of God, as this Maxime is not, and therefore if the husband in this case be not holpen by conscience he cannot be holpen by the law D. And if the law helpe him not, conscience cannot help him in this case, for conscience must alway be grounded upon some law, and it cannot in this case be grounded upon the Law of reason, nor upon the Law of God, for it is not directly by those lawes that a man shall be tenant by curtesie, but by the custome of the realm. And therefore if the custome helpe him not, he can nothing have in this case by conscience: for conscience

neber reſiſteth the law of man, nor addeth no-thing to it, but where the law of man is in it ſelf directly againſt the Law of reaſon, or elſe the Law of God, and then properly it cannot bee called a Law, but a corruption, or where the generall grounds of the Law of man worke in any particular caſe againſt the ſaid Lawes, as it may do, and yet the law good, as it appeareth in divers places in our firſt dialogue in Latin, or elſe, where there is no law of man provided for him that hath right to a thing by the law of reaſon or by the law of God. And then ſometime there is remedy given to execute that in conſcience, as by a Subpœna, but not in all caſes: for ſometime it ſhall be referred to the conſcience of the party, and upon this ground (that is to ſay that where there is no title given by the common Law, that there is no title by conſcience: There be divers other caſes, whereof I ſhall put ſome for an example. As if a Reverſion bee granted unto one, but there is no attornement: or if a new rent be granted by word without deed, there is no remedy by conſcience, unleſſe the ſaid grants were made upon conſideration of money or ſuch other. And in like wiſe where he that is ſeiſed of lands in Fee-ſimple maketh a will thereof, that will is void in conſcience, becauſe the ground ſerveth not for him whereby the conſcience ſhould take effect, that is to ſay, the law. And if the tenant make a feoffement of the land that he holdeth by priority, & taketh eſtate againe, and dyeth (his heire within age) the Lord of whom the land was firſt holden by priority, ſhall have no remedy, for the body by

conſcience, for the law that firſt was with him, is now againſt him: & therefore conſcience is altered in like wiſe as the Law altereth. And diuers and many caſes like be in the Law that were too long to rehearſe now. And thus me thinketh that if the law be as thou ſaiſt, the husband in this caſe hath neither right by the Law, nor conſcience.

§ The fourteenth queſtion of the Student.

Chap. 16.

A Rent is granted to a man in fee to perceiue of two acres of land, and after the grantor enfeoffed the grantee of one of the ſaid acres, whether is the whole rent extinct thereby in conſcience as it is in the law? D. This caſe is ſomewhat uncertain: for it appeareth not whether the grantor enfeoffed him on truſt, or that hee gaue the acre to him of his meere motion, to the uſe of the ſaid feoffee, or elſe that the feoffement was made upon a bargaine, and if it were but onely a feoffement of truſt, then I think the whole rent abideth in conſcience though it bee extinguiſhed in the law: & firſt that it continueth in that caſe in conſcience, for the part that the grantee hath to the uſe of the grantor it is euident, for he may not take the profits of the land, and it is againſt conſcience that he ſhould take both. and in like wiſe it abideth in conſcience for the acre that remaineth in their hands of the grantor, though it be extinct in the Law: For there was a default in the grantor that he would make the feoffement to the grantee, aſwell as there

was

was in the grantee to take it. And it is no conscience that of his own default he should take so great availe to be discharged of the whole rent, seeing that the feoffement was made to his owne use. And if the feoffement were made upon a bargaine and a contract betweene them then it is to see whether they remembred the rent in their bargaine, or that they remembred it not. & if they remembred it in their bargain & contract, then conscience must follow the bargaine: As thus: if they agree that the Grantee should have the rent after the portion in the other acre, then by conscience he ought to have it though it be extincted in the law: And if they agreed that the whole rent should be extinct, and made their price according, then it is extinct in law & conscience: and if they clerely forgot it & made no mention of it or for lack of cunning tooke the law to be, that it should continue in the other acre after the portion, and made their price according, pondering onely the value of the acre that was sold, then me thinketh it doth continue in conscience after the portion. & if the feoffement were made to the use of the grantee, then it seemeth the whole rent is extinct in law and conscience. S. Then take this to be the case that is to say, that the feoffement was made to the use of the grantee. D. What is then thine opinion therein? S. That the rent should bide in conscience after the portion of the acre remaining in the hands of the grantor, notwithstanding it be extinct in the law. D. Then shew me thine opinion in this that I shall aske thee: Of what law is it that grants of rent and of such other

por-

profits out of land may be made, and that they shall be good & effectual to the grantees, whether it is by the law of reason, or by the law of God, or by the custom and law of the realm. S. I think it is by the law of reason: for by the same reason that a man may give away all his lands, he may as it seemeth give away the profits thereof, or grant a rent out of the land if he will. Do. But then by what law is it that a man may give away his lands? I trow by no other law but by the customs of the realme, for by statute all alienations & grants of lands may be prohibited, and then that reason proveth not that grants of the profits of land or of a rent should be good because he may alien the land: if alienation of land be by custome and not by the law of reason, as I suppose it is, whereof I have touched somewhat in our first Dialogue in Latin the 19. chapter. And also if grants should have their effect by the law of reason, then Reason would they should be good by the only word of the Grantor, as well as by his deed. And that is not so, for without deed the grant of rent is void in law: and so me thinketh that grants have their effects onely by the law of the Realme. Stu. Admit it be so, what meanest thou thereby? Do. I shall shew thee hereafter, as I shall shew thee the cause why I think the rent is extinct in conscience, as well as in law. And first as I take it, the reason why it is extinct in the law, is because the rent by the first grant was going out of both acres, and was not going part out of the one acre, and part out of the other, but the whole rent was going out

of

of both, and then when the grantee of his owne folly will take estate in the one acre, whereby that acre is discharged, then the other acre also must be discharged, unlesse it should be apportioned and the law will not that any opposition ment should be in that case, but rather insomuch as the party hath by his own act discharged the one acre, the law discharged also the other rather then to suffer the other acre to be charged contrary to the forme of the grant. For this rent beginneth all by the act of the party: And as I have heard, it is called a rent against common right. Wherefore it is not favoured in the law, as a rent service is: and then me thinketh that for as much as it is not grounded by the law of reason, that grants of rent should be made out of land, but by custom and law of the Realme, as I have said before: that so in like wise it remaineth to the law and custome of the Realm, to determine how long such rents shall continue. And when the law judgeth such rent to be void, I suppose that so doth conscience also, except the judgement of the law bee against the law of reason or the law of God, as it is not in this case. For in this case he that taketh the feoffement hath profit by the feoffement, and knoweth that he hath such a rent out of the land, and that this purchase should extinct it, whereby it appeareth that he assenteth unto the law, whereto he was not compelled. and that is his owne act and his owne default so to doe, which shall extinct his whole rent as well in conscience as in law. But if he have no profit of the land: or be ignorant that hee hath such a rent out of

the

the land, which is called ignorance of the deed, or if he bee ignorant, that the law would extinct his whole rent thereby, which is called ignorance of the Law. then me thinketh it remaineth in conscience after the portion St. Ignorance of the law or of the deed helpeth not but in few cases in the Law of England. D. And therefore it must be reformed by conscience, that is to say, by the law of reason, for when the generall Maximes of the law be in any particular cases against the law of reason as this Maxime seemeth to be because it excepteth not them that be ignorant, though it be an ignorance invincible, then doth it not agree with the law of reason. S. Me thinketh that ignorance in this case helpeth little. For when a man buyeth any land or taketh it of the gift of any other, he taketh it at his perill, so that if the title be not good ignorance cannot helpe, for the buyer must beware what he buyeth: and so in this case if the taking of an acre should extinct the whole rent in conscience, if he were not ignorant, so mee thinketh it should in like wise extinct it also, though he be ignorant of the law, or of the deed: for every man must be compelled to take notice of his owne title, and out of what land his rent is going and so me thinketh ignorance is but little to be considered in this case. D. If a man buy land or taketh it of gift of another, it is reason that hee take it with the perill, though hee be ignorant that another hath right: for it were not standing with reason that his ignorance should extinct the right of another, but in this case there is no doubt of the right of the land:

but

but all the doubt is how the rent shall be ordred in conscience, if he that hath the rent take part of the land: & therein is great diversity betweene him that is ignorant in the Law, and him that knoweth the law, & knoweth will also that he hath a rent out of the Land, and other. For I put case that he asked counsell of the grantor himselfe therein, and he saying as hee thought, told him that the taking of the one acre should not extinct the rent but for the portion and so he thinketh the law to be tocke the other acre of his gift: Is it not reasonable in that case, that the ignorance should save the rent in conscience? St. Yes, for there the grantor himselfe is party to his ignorance, and in manner the cause thereof. D. And me thinketh all is one, if any other had shewed him so, or if he asked no counsell at all, for me thinketh it sufficeth in this case that he be ignorant of the Law: For why, it is more hard in this case to prove the rent should be extinct in conscience, though he knew it should be extinct in the Law, then to prove that it continueth in conscience after the portion if he be ignorant, and thou thy selfe were of the same opinion, as it appeareth in the beginning of this present Chapter: but if the opinion were true, it would be hard to prove but that the said generall Statute were wholly against reason, and then it were void; but I have sufficiently answered thereto as me seemeth, and that it is extinct in the law, & also in conscience, except ignorance help it to be apportioned. And moreover, forasmuch as apportionment is suffered in the Law, where part of the land descen-

preceedeth to the grantee, because no default can be assigned in him: some thinke no default can be assigned in him in conscience, when he is ignorant of the law or of the deed, though such ignorance do not excuse in the law of the realm. S. I am content with thine opinion in this behalfe at this time.

§ The fifteenth question of the Student.

Chap. 17.

A Man granteth a Rent charge out of two acres of land, and after the grantor infeoffeth H. H. in one of the said two acres to the use of the said H. H. and of his heires, and after the said H. Hart, intending to extinct all the rent, causeth the said acre to bee recovered against him to his owne use in a writ of Entry in le Post in the name of the grantee and of others after the common course, the grantee not knowing of it, and by force of the said recovery the other demandants enter and die living the grantee, so that the grantor is seised of all by the surbor to the use of the said H. H whether is the said rent extinct in conscience in part or in all, or no part? D. I am in doubt of the law in this case. S. In what point? Do. Whether the whole rent be going out of the acre that remaineth in the hands of the grantor, because the grantee commeth to the land by way of recovery, or that it shall be extinct in law but after the portion, because the grantee hath not the acre to his owne use, or that the

whole

whole rent shall be extinct in the Law S. The rent cannot be whole going out of the acre that the grantor hath: for this recovery is upon a feigned title, and the grantor because he is strange to it shall be well received to falsifie it. But if the Recovery had been upon a true title, then it had been as thou saist, if the grantee recover the one acre against the grantor upon a true title, the grantor shall pay the whole rent out of the land that remaineth in his hand: and as to the use it maketh no matter to the grantor as to the Law in whom the use be: for the possession without the use extinguisheth the whole rent as against him in the Law, as well as if the possession and use were both joined together in the grantee.

D. Then me thinketh that the said Henry Hall is bound in conscience to pay the grantee the rent after the portion of that acre that was recovered, for it cannot stand with conscience that he should lose his rent, and have no profits of Land. S. Then of whom shall he have the other portion of his rent? D. Is the Law cleere that the acre that the grantor hath shall be in this case discharged in the Law? S. I take the Law so.

D. And what in conscience? S. As against the grantor me thinketh also it is extinct in conscience. for the reason that thou hast made in the 16. Chapter. For it is all one in conscience in this case as against the grantor, whether the recovery were to the use of the grantee or not, specially seeing that the grantor is not privy to the recovery: for the unity of possession

is the cause of extinguishment of the rent against the grantor both in Law and conscience, wherefoever the use be. But if the grantor had been privie to the cause of the extinguishment, as he was in the case that I put in the last Chapter, where the grantor enfeoffed the grantee of one of the acres to the use of the grantee, there it is not extinct in conscience in that acre that remaineth in the hands of the grantor, though it be extincted in the law because he was privy to the extinguishment himselfe: but he is not so in this case, & therefore it is extinct against him in law and conscience. And therefore me thinketh that the grantee shal in conscience have the whole rent of the said H. Hart, that caused the said recovery to be had in his name, for in him was all the default: but it is to be understood, that in all the cases, where it is said before in this Chapter or in the chapter next before, that the rent is extinct in the law, and not in conscience, that in such case, all the remedies that the party might first have had for the rent at the common law by distresse, assise, or otherwise, are determined, and the party that ought to have the rent in conscience, shall be driven to sue for his remedy by Subpœna. D. I am content with thy conceit in this matter for this time.

§ The eighteenth question of the Student.

Chap. 18.

A Villaine is granted unto a man for terme of life, the villaine purchaseth lands to him

and

and to his heires, the tenant for terme of life entreth: in this case by the law he shall enjoy the lands to him and to his heires whether shall he do so in like wise in conscience?

D. Me thinketh it is first good to see whether it may stand with conscience, that one man may claime another to be his villaine, and that he may take from him his lands and goods, and put his body in prison if he will: it seemeth he loveth not his neighbour as himselfe, that doth so to him.

St. That law hath been so long used in this Realme, and in other also, and hath been admitted so long in the Lawes of this Realme, and of divers other lawes also, and hath been affirmed by Bishops, Abbots, Priests, and many other men both Spirituall and Temporall, which have taken advantage by the said Law, and have seised the lands and goods of their villaines thereby, and call it their right inheritance so to do: That I think it not good now to make a doubt, ne to put it in argument whether it stand with conscience or not, and therefore I pray thee, admitting the Law in that behalfe to stand in Conscience, shew me thine opinion in the question that I have made.

Do. Is the Law clere that he that hath the villaine but onely for terme of life shall have the lands that that villaine purchaseth in fee to him and to his heires?

S. Yea verily I take it so.

D. I should have taken the law otherwise: for

if a Seigniorie be granted to a man for terme of life and the tenant attourne, & after the lord eschеat, and the tenant for terme of life entreth, he shall have there none other estate in the land then he had in the Seigniory: and me thinketh that it should be like law in this case, and that the Lord ought to have in the Land, but such estate as he hath in the villaine. S. The cases be not alike, for in the case of the eschеate the tenant for terme of life of the Seigniorie, hath the lands in the lieu of the Seigniorie, that is to say, in the place of the Seigniorie & the Seigniorie is cleerely extinct: but in this case he hath not the land in the lieu of the villaine, for he shall have the villaine still as he had before, but he hath the lands as a profit come by meanes of the villaine, which he shall have in like case as the villaine had them that is to say, of all goods and chattels hee shall have the whole property, and of a lease for term of yeares he shall have the whole terme, and for terme of life he shall have the same estate, the Lord shall have in the land during the life of the villaine, and of land in fee simple, and of an estate tayle that the villaine hath, the Lord shall have the whole fee simple although he had the villaine onely for terme of yeares. so that he enter or seise according to the law before the villaine alien, or else he shall have nothing.

D. Verily and if the law be so, I think conscience followeth the law therein. For granting that a man may with conscience have another man to be his villaine the judgements of the Law in this case ought to determine what estate the

the Lord hath in the Land by his entry) is neither against the Law of reason nor against the Law of God and therefore conscience must follow the Law of the Realme. But I pray thee let me make a little digression to heare thine opinion in another case somewhat pertaining to the question, and it is this: If an Executor hath a villain that is testator had for terme of years, & he purchaseth lands in fee, and the Executor entreth into the Land, what estate hath he by his entry? S. A Fee simple, but that shall be to the behoofe of the testator, and shall be an assets in his hands. D. Well then I am content with thy conceipt at this time in this case, and I pray thee proceed to another question. S. Forasmuch as it appeareth in this case and in some other before that the knowledge of the Law of England is right necessary for the good observing of the conscience: I would hear thine opinion, If a man mistake the law, what danger it is in conscience, for the mistaking of it. D. I pray thee put some case in certain thereof that thou doubtest in, and I will with good will shew thee the mind therein, or else it will be somewhat long ere it can be plainly declared, and I would not be tedious in this writing.

§. The seventeenth question of the Student.

Chap. 19.

A man hath a Villaine for terme of life, the Lord purchaseth lands in fee in the same

of the last Chapter, and the tenant for terme of life entreth, and after the villaine dyeth, hee in the reversion pretending that the tenant for terme of life hath nothing in the Land but for terme of life of the villaine, asketh counsell of one that sheweth him that he hath good right to the Land, and that hee may lawfully enter, and though that counsell hee in the reversion entreth by reason of the which entry, great suites and expences follow in the Law, to the great hurt of both parties. What danger is this to him that gave the counsell? Do. Whether meanest thou that he that gave the counsell gave it willingly against the Law, or that he was ignorant of the Law? Stu. That hee was ignorant of the Law: for hee knew the Law, and gave counsell to the contrary, I think him bound to restitution, both to him against whom he gave the counsell, and also to this Client (if he would not have sued but for his counsell) of all that they be damnified by it.

D. Then will I yet further aske thee this question, whether he of whom he asketh counsell gave himselfe to learning, and to have knowledge of the Law after his capacity, or that he tooke upon him to give counsell, and tooke no study competent to have learning? for if he did so, I thinke he be bound in conscience to restitution of all the costs and dammages that he sustained, to whom he gave counsell, if he would not have sued but through his counsell, and also to the other party. But if a man that hath taken sufficient study

in

in the law, mistake the law in some point that is hard to come to the knowledge of, he is not bounden to such restitution for he hath done that in him is: but if such a man knowing the Law give counsell against the Law is bound in conscience to restitution of costs and damages (as thou hast said before) and also to make amends for the trouth

Stu. What if he aske counsell of one that he knoweth is not learned, and he giveth him counsell in this case to enter, by force whereof he entreth? Do. Then be they both bound in conscience to restitution, that is to say, the party if he be sufficient, and else the Counsellor because he assented and gave counsell to the wrong

St. But what is the Counsellor in that case bounden to him that he gave counsell to? Do. To nothing: For there was as much default in him that asked the counsell, as in him that gave it, for he asked counsell of him that his law was ignorant, and in the other was default for the presumption, that he would take upon him to give counsell in that he was ignorant.

St. But what if he that gave the counsell, knew not but that he that asked it, had trust in him, that he could and would give him good counsell, and that he asked counsell for to ease well his conscience, howbeit that the trouth was, that he could not so do?

Do. Then is he that gave the counsell bounden to offer to the other amends, but yet the other may not take it in conscience.

12. That were somewhat perilous: For hap-
ly he would take it though he have no right to
it, except the world be well amended. D: What
thinkest thou in that amendment? S. I trust
every man will doe now in this world as they
would be done to, speak as they think, restore
where they have done wrong, refuse money if
they have no right to it, though it be offered
them, do that they ought to doe by conscience, &
though that they cannot be compelled to it by
no law, and that none will give counsell but
that they shall think to be according to consci-
ence, and if they doe, to do what they can to re-
forme it, and not to intermit themselves with
such matters as they be ignorant in but in such
cases to send them that aske the counsell to o-
ther, that they shall thinke be more cunning then
they are.

13. It were very well if it were as thou hast
said, but the more pity, it is not alway so.
And especially there is great default in giver
of counsell; for some for their owne lucre and
profits give counsel to comfort other, to sue that
they know have no right but I trust there be
but few of them: and some for dread, some for
favour, some for malice, and some upon conside-
rations, and to have as much done for them ano-
ther time to hide the truth. And some take upon
them to give counsell in that they be ignorant
in, and yet when they know the truth, will not
withdraw that they have wisdome, for they
thinke it should be greatly to their rebuke, and
such persons follow not this counsell, but said
That we have unadvisedly done, let us [illegible]

good

good advice revoke again. § And if a man give counsell in this Realme after as his learning and conscience giveth him, and regardeth not the Lawes of the Realme, giveth he good counsell? Do. If the Law of the Realme be not in that case against the Law of God, nor against the Law of reason, he giveth good counsell: for every man is bound to follow the Law of the countrey where he is, so it bee not against the said lawes, and so may the case bee, that hee may bind himselfe to restitution. § a. At this time I will no further trouble thee in this question.

§ The eighteenth question of the Student.

Chap. 20.

IF a man of his meere motion give Lands to B. and to his heires by Indenture, upon a condition, that hee shall yearly at a certaine day pay to Jo. at Stile out of the same land a certaine Rent, and if he bee not, that then it shall be lawfull to the said Jo. at Stile to enter &c. if the rent in this case be not payed to John at Stile: whether may the said John at Stile enter into the Lands by conscience, though hee might not enter by the law? Doct. May he not enter in this case by the Law, sith the words of the Indenture be that he shall enter? § a. Notwithstanding, for there is an ancient Maxime in the Law that no man shall take advantage in a condition, but he that is party or privy to the condition, and this man is not party nor privy nor

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wherefore he shall have no advantage of it. D. Though he can have no advantage of it as party yet because it appeareth evidently that the intent of the giver was, that if hee were not payed of the rent, that he should have the land: It seemeth that in conscience hee ought to have it: though hee cannot have it by the Law. Stu. In many cases the intent of the party is void to all intents, if it be not grounded according to the Law: and therefore if a man make a lease to another for terme of life, and after of his meere motion he confirmeth his estate for terme of life to remaine after his death to another, and to his heires; In this case that remainder is void in law and conscience. for by the law there can no remainder depend upon no estate, but that the same estate beginneth at the same time that the remainder doth: And in this case the estate began before, and the confirmation enlarged not his estate, nor gave him no new estate. But if a lease be made to a man for terme of another mans life, and after the lessor onely of his meere motion confirmeth the Land to the Lessee for terme of his owne life, the remainder over in Fee. this is a good remainder in the law and conscience: and so me thinketh the intent of the party shall not be regarded in this case. D. And in the first case that thou hast put, me thinketh though it passe not by way of grant of that, yet shall it passe, as by the way of remainder of the reversion, for every deed shall be taken most strong against the grantor, and the taking of the deed in this case is an attornement in it selfe. St. That cannot

not bee, for he in the remainder is not party to the deed, and therefore it cannot be taken by the way of grant of the reversion, for no grant can be made but to him that is party to the deed, except it be by way of remainder. And therefore if a man make a lease for terme of life, and after the lessor grant to a stranger that the tenant for terme of life shall have the land to him and to his heires, that grant is void if it bee made onely of his meere motion without recompence, and in like wise if a man make a Lease for terme of life, and after grant the reversion to one for terme of life, the remainder over in fee, and the tenant attourne to him that hath the estate for terme of life onely, intending that he onely should have advantage of the grant, his intent is void, and both shall take advantage thereof, and the attournement shall be taken good according to the grant: and so in this case, though the Feoffee intended that if the rent were not payed, that the stranger should enter, yet because the Law giveth him no entry in that case, that intent is void and the same stranger shall neither enter into the land by law nor conscience. Doct. What shall then be done with that land as thou thinkest after the condition broken? S. I thinke that the feoffor in this case may lawfully reenter, for when the feoffement was made upon condition that the feoffee should pay a rent to a stranger, in those words is concluded in the law that if the rent were not payed to the stranger, that the feoffor should reenter: for those words upon condition imply so much in the Law though it be not expressed.

And

And then when the feoffor went further & said that if the rent were not payd, that the stranger should enter, those words were void in the Law: and so the effect of the deed stood upon the first words. whereby the feoffer may reenter in law & conscience: but if the first words had not ben conditionall, I would have holden it the greater doubt. D. I pray thee put the case thereof in certaine with such words as be not conditionall that I may the better perceive what thou meanest therein.

§ The nineteenth question of the Student.

Chap. 21.

A Man maketh a Feoffement by deed indented, & by the same deed it is agreed, that the feoffee shall pay to A. B. and to his heires a certaine rent yerely at certaine dayes, & that if he pay not the rent, then it is agreed that A. B. or his heires shall enter into the land & after the feoffee payeth not the rent: that the question is, who ought in conscience to have his land and rent. Do. Ere we argue what conscience will, let us know first what the Law will therin. S. I think that by the law neither the feoffor, ne yet the said A. B. shall never enter into the land in this case for none-payment of the rent, for there is no reentry in this case given to the Feoffor for not payment of the rent as there is in the case next before, & the entry that is given to the said A. B for not payment thereof is void in the law, because he is strange to

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the deed as it appeareth also in the next chapter before. And therefore me thinketh that the greatest doubt in this case is to see to what use this feoffement shall be taken.

Doct. There appeareth in this case as thou hast put it, no consideration, ne recompence given to the feoffor, whereupon any use may be derived: and if the case be so indeed. and that the feoffor declared never his mind therein, to what use shall it then be taken? St. I think it shall be taken to be to the use of the feoffee as long as he payeth the rent, for there is no reason why the feoffee should be bosied with payment of the rent having nothing for his labour: ne it may not conveniently be taken that the intent of the feoffor was so, except hee expressed it and then it must be taken that hee intended to recompence the feoffee for the businesse that he should have in the payment over and by the words following, his intent appeareth to bee so, as me thinketh, for if the rent were not payed he would that A. B. should enter. and so it seemeth he intended not to have any use himselfe: and thus me seemeth this case should vary from the common case of uses, that is to say, if a man seised of land make a feoffement thereof, and it appeareth not to what use the feoffement was made, ne it is not upon any bargaine or other recompence. then it shall be taken to be to the use of the feoffor, except the contrary can be proved by some bargaine or other like, or that his intent at the time of the delivery of seisin was expressed that it should be to the use of the feoffee or of some other, and then it

shall

shall goe according to his intent: but in this case me thinketh it shall be taken that his intent was that it should first be to the use of the feoffee, for the cause before rehearsed, except the contrary can be proved, & so that knowledge of the intent of the feoffor is the greatest certainty for knowledge of the use in this case as me seemeth: but when the feoffor goeth further, and said that if the rent be not payed, that then the said I. B. should enter into the Land, then it appeareth that his intent was that the rent should cease, and that I. B. should enter into the Land, and though he may not by those words enter into the land after the rules of the Law, and to have freehold, yet those words seeme to bee sufficient to prove that the intent of the feoffor was, that he should have the use of the land: for sith he had the rent to his owne use, and not to the use of the feoffor, so it seemeth he shall have the use of the land that is allowed to him for the payment of the rent. D. But I am somewhat in doubt whether he had the rent to his owne use: for the intent of the feoffor might be that he should pay the rent for him to some other, as some other use might be appointed thereof by the feoffor. St. If such an intent can be proved, then the intent must be observed: but we bee in this case to wit, to what use it shall bee taken if the intent of the feoffor might be proved. and then me thinketh it cannot be otherwise taken, but it shall be to the use of him to whom it should be paid: for though it be called a rent, yet it is no rent in law, ne in the law he shall never have remedy for it, though it were

were assigned to him, and to his heires without condition, neither by distresse, by assise, by writ of annuity, nor otherwise, but he shall bee driven to sue in the Chantery for his remedy, and then when he sueth in the Chancery, hee must surmise that he ought to have it by conscience, and that he can have no remedy for it in the law And then sith he hath no remedy to come to it but by the way of conscience, it seemeth it shal be taken that when he hath recovered it that he ought to have it in conscience. & that to his owne use without the contrary can bee proved, and if the contrary can bee proved, and that the intent of the feoffor was, that hee should dispose it for him as he should appoint, then hath he the rent in use to another use, and so one use should be depending upon another use, which is seldome seene, and shall not bee intended till it be proved: and so, sith no such matter is here expressed me thinketh the rent shall be taken to be to the use of him that it is paid to, and the land in like wise that is appointed to him for not payment of the said rent shall be also to his use, how thinkest thou will conscience serve therein? Do. I think that as thou takest the law now, that conscience (in this case) and the Law be all one, for the Law seeketh the same thing in this case, to know the case that conscience doth that is to say, the intent of the feoffor, and therefore I would moove thee further in one thing &c. What is that?

D. That sith the intent of the feoffor shall be so much regarded in this case, why it ought not also

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to be as much regarded in the case that is in the last chapter next before this, where the words be conditionall, and give the feoffor a title to reenter: for me thinketh, that though the feoffor may in that case reenter for the condition broken, that yet after this entry he shall be seised of the land after his entry to the use of him, to whom the Land was assigned by the said indenture for lack of payment of the rent, because the intent of the feoffor shall be taken to be so in that case aswel as in this. And I pray thee let me know thy mind. what diversity thou puttest betweene them. S. Thou drivest me now to a narrow diversity, but yet I will answer thee therein as well as I can. D. But first ere thou shew me that diversity, I pray thee shew me how Uses began, and why so much land hath beene put in use in this Realme as hath beene. S. I will with good will say as mee thinketh therein.

§ How uses of land first began, and by what law, and the cause why so much land is put in use.

Chap. 22.

USes were reserved by a secondary conclusion of the law of reason in this manner: When the generall customs of property, whereby every man knew his own good from his neighbors, was brought in among the people: It followed of reason that such lands & goods as a man had, ought not to be taken from him but by his

assent or by order of a law: and then sith it is so that every man that hath lands hath thereby two things in him, that is to say, the possession of the Land which after the Law of England is called the frankstenement or the freehold, and the other is authority to take thereby the profits of the land: wherefore it followeth that he that hath land and intendeth to give only the possession and freehold thereof to another, & to keep the profits to himselfe, ought in reason & conscience so to have the profits, seeing there is no law made to prohibite, but that in conscience such reservation may be made. And so when a man maketh a feoffement to another, and intendeth that he himselfe should take the profits, then the feoffee is said seised to his use that is entreoffed him that is to say, to the use that he shall have the possession and freehold thereof, as in the law to the intent that the feoffor shall take the profits: & under this manner, as I suppose use of land first began. D. It seemeth that the reserving of such use is prohibited by the law, but if a man make a feoffement and reserve the profits, or any part of the profit, as the grasse, wood, or such other, that reservation is void in the Law: & me thinketh it is all one to say, that the law judgeth such a thing if it be done to be void, and that the law prohibiteth that the thing shall not be done. S. Truth it is that such reservation is void in the law as thou saist, and that is by reason of a maxime in the Law, that willeth that such reservation of part of the same thing shall be judged void in the law; but yet the law doth not prohibite that no such reservation shall be made,

but if it be made it judgeth of what effect it shall be that is to say, that it shall be void, and so bee that thereby such reservation offendeth no law thereby he breaketh no law thereby and therefore the reservation in conscience is good: but if it were prohibite by Statute that no man should make such reservation, or that no feoffment of truth should be made but that all the feoffements should be to the use of him to whom possession of the land is given: then the reservation of such uses against the Statute should be void because it were against the law, & yet such a Statute should not be a Statute against reason because such uses were first grounded and reserved by the law of reason, but it should prevent the law of reason and should put away the consideration whereupon the law of reason was grounded before the Statute made. And then to the other question, that is to say, why so much land hath been put in use, it will be somewhat long & peradventure tedious to some, tedious to shew all the causes particularly: but the very cause why the use remained to the feoffor notwithstanding his own feoffement or fine, sometime notwithstanding a recovery against him, is all upon one consideration after the cause and intent of the gift, fine, or recovery, as is aforesaid. Do. Though reason may serve that upon a feoffment a use may be reserved to the feoffor by the intent of the feoffor against the forme of his gift, as thou hast said before, yet I marvell much how a use may be reserved against the fine that is one of the highest Records that is in the law, and is taken in the Law of so high effect that it should make an end

end of all strifes, or against a recovery that is ordained in the Law for them that be wronged to recover their right by: and me thinketh that great inconvenience and hurt may follow, when such Records may so lightly be avoided by a secret intent or use of the parties, and by a naked and bare averment and matter indeed, and especially such such a matter indeed may be alledged that is not true, whereby may rise great strife betweene the parties, and great confusion & uncertainty in the Law: but nevertheless sith our intent is not at this time to treat of that matter, I pray thee touch shortly some of the causes why there hath been so many persons put in estate of lands to the use of other, as there hath been, for as I hear say, few men be sole seised of their owne land. There hath been many causes thereof, of the which some be put away by divers Statutes & some remain yet: wherefore then shalt understand, that some have put their land in feoffement secretly to the intent that they that have right to the land, should not know against whom to bring their action, and that is somewhat remedied by divers Statutes that give actions against Barretts, and Takers of the profits. And sometime such feoffements of land have been made to have maintenance & bearing of their feoffees, which peradventure were great Lords or rulers in the Countrey; and therefore to put away such maintenance, treble damnages be given by statute against them that make such feoffements for maintenance. And sometime they were made to the use of Mortmaine, which might then not be made with-

out forfeiture though it were prohibited that the freehold might not be given in Mortmaine. But that is put away by the Statute of R. 2. And sometime they were made to defraud the Lords of wards, reliefs, herriots, and of the lands of their villeines: but those points be put away by divers statutes made in the time of King H. the 7. Sometime they were made to avoid executions upon Statutes Staple, Statute Marchant, & Recognisance: and remedy is provided for that, that a man shall have execution of all such lands as any person is seised of to the use of him that is so bound, at the time of execution sued in the 19. yeare of H. 7. And yet remain feoffements, fines, and recoveries in use of many other causes, in manner as many as there did before the said statute. And one cause why they be yet thus used, is to put away tenancy by the curtesie, and titles of Dower. Another cause is, for that lands in use shall not be put in execution upon a Statute Staple, Statute Marchant, nor Recognisance, but such as be in the hands of the Recognisor at the time of the execution sued. And sometimes lands be put in use that they should not be put in execution upon a writ of Extendi facias ad valentiam. And sometime such uses be made that he to whose use it may declare his will thereon, and sometime for surety of divers covenants in indentures of marriage, and other bargains, & these 3. all articles, be the chiefe & principle cause why so much land is put in use. Also lands in use be not assets neither in a Formedon, nor in an action of Debt against the heire: ne they shall not be put in execution

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cution by an Elegit sued upon a recovery as some men say: and these be the very chiefe causes as I now remember, why so much land standeth in use as there doth: and all the said uses be reserved by the intent of the parties understood or agreed betweene them, and that many times directly against the words of the feoffement fine, or recovery, and that is done by the law of reason, as is afore said. D. May not a use be assigned to a stranger, as well as to be reserved to the Feoffor, if the Feoffor so appointed it upon his feoffement? Stu. Yes as well, and in like wise to the Feoffee, & that upon a free gift without any bargaine or recompence, if the feoffor so will. D. What if no feoffement be made but that a man grant to his feoffee, that from henceforth he shall stand seised to his owne use, is not that use changed, though there be no recompence? Stu. I thinke yea, for there was an use in Esse before the gift, which he may as lawfully give away, as he might the land if he had it in possession. D. And what if a man being seised of land in fee, grant to another of his meere motion without bargaine or recompence, that he from henceforth shall be seised to the use of the other, is not that grant good? Stu. I suppose that it is not good, for as I take the law, a man cannot commence an use but by livery of seisin, or upon a bargaine or some other recompence. Doct. I hold me contented with that thou hast said in this Chapter for this time, & I pray thee shew me what diversity thou puttest betweene those two cases that thou hast before rehearsed in the 20. Chapter, and the 21. Chapter of this

present book. S. I will give good will.

§ The diversity between two cases hereafter following, whereof one is put in the 20. Chapter, and the other in the 21. Chapter of this present Booke.

Chap. 23.

The first case of the said two cases is this. A man maketh a feffment by deed indented upon a condition that the feoffee shall pay certain rent yearly to a stranger, et, and if he pay it not, that it shall be lawfull for the stranger to enter into the land. In this case I said before in the 20. Chapter, that the stranger might not enter, because that he was not privy unto the condition. But I said, that in that case the feoffor might lawfully reenter by the first words of the Indenture, because they imply a condition in the law and that the other words (that is to say) that the stranger should enter, be void in law and conscience. And therefore I said farther, that when the feoffor had reentered, that he was seised of the land to his own use, and not to the use of the stranger, though his intent at the making of the Feoffement, were that the stranger after his entry, should have had the land to his owne use, if he might have entred by the law. And the cause why I think that the feoffor was seised in that case to his owne use, I shall shew thee afterward. The second case is this, a man maketh a feoffement in fee, and it

is agreed upon the feoffement, that the feoffee shall pay a yearly rent to a stranger & if he pay it not, that then the stranger shall enter into the Land. In this case I said as it appeareth in the said 21. Chapter, that if the Feoffee payd not the rent, that the stranger should have the use of the land though he may not by the rules of the law enter into the land: and the diversity betweene the cases me thinketh to be this: In the first case it appeareth as I have said before in the said 20. Chapter, that the feoffor might lawfully reenter by the Law for non payment of rent and then when he entred according, he by that entry avoided the first livery of seisin, in so much that after the reentry hee was seised of the land of like estate as he was before the feoffement: and so remaineth nothing, whereupon the stranger might ground his use, but onely the bare grant or intent of the feoffor: when he gave the land to the feoffee upon condition that he should pay the rent to the stranger and if not, that it should bee lawfull to the stranger to enter: for the feoffement is avoided by the reentry of the feoffor as I have said before: and as I said in the last Chapter, as I suppose a nude or bare grant of him that is seised of land, is not sufficient to begin an use upon. D. A bare grant may change an use as thou thy self agreed in the last Chapter, why then may not an use as well begin upon a bare grant? S. when an use is in Esse, hee that hath the use may of his meere motion give it away if hee will without recompence, as he might the land if hee had it in possession.

but I take it for a ground, that he cannot so begin an use without livery of seisin, or upon a recompence or bargaine, and that there is such a ground in the law, that it may not so begin it appeareth thus: it hath been alway holden for law, that if a man make a deed of feoffement to another, and deliver the deed to him as his deed, that in this case he to whom the deed is delivered, hath no title ne medling with the land afore livery of seisin be made to him. but onely that he may enter and occupy the land of the will of the feoffor & there is no book saith that the feoffee in that case is seised thereof before livery to the use of the feoffee. And in like wise if a man make a deed of feoffement of 2 acres of land that lye in 2. shires. intending to give them to the feoffee, and maketh livery of seisin in the one shire & not in the other, in this case it is commonly holden in bookes that the deed is void to the acre where of livery is made except it lye within that view, save only that he may enter & occupy at will as is aforesaid: and there is no book that saith that the feoffee should have the use of the other acre, for if an use passed thereby, then were not the deed void unto all intents. and yet it appeareth by the words of the deed, that the feoffor gave the lands to the feoffee, but for lack of livery of seisin the gift was void, & so me thinketh it is here without livery of seisin be made accordingly: but in the 2. case of the said 2. cases the feoffee may not reenter for non-payment of the rent. and so the first livery of seisin continueth and standeth in effect, and thereupon the first use may well begin and take effect in the stranger of the land

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when the rent is not paid unto him according to the first agreement. And so me thinketh that in the first case the use is determined, because the livery of seisin, whereupon it commenced, is determined, and that in the second case the use of the land saueth effect in the stranger for not payment of the rent by the grant made at the first livery, which yet continueth in his effect, & this me thinketh is the diuersity betweene the cases. Doct. Yet notwithstanding the reason that thou hast made, me thinketh that if a man seised of lands, make a gift thereof by a nude promise without any livery of seisin or recompence to him made, and grant that he shall be seised to his use, that though the promise bee void in the law, that nevertheless it must hold and stand good in conscience, and by the law of reason; for one rule of the law of reason is, that we may do nothing against the truth, and sith the truth is that the owner of the ground hath granted that he shall be seised to the use of the other, that grant must needs stand in effect, or else there is no truth in the grantor. Stu. It is not against the truth of the grantor in this case, though by the grant hee bee not seised to the use of the other, but it proueth that hee hath granted that the Law will not warrant him to grant, wherefore his grant is void. But if the grantor had gone further and said, that hee would also suffer the other to take the profits of the lands without let or other interruption, or that he would make him estate in the land when he should be required, then I thinke in those cases he were bound in conscience

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by that rule of the Law of reason that thou hast remembred to perform them, if he intended not, bounden by his promise, otherwise he should go against his owne truth, and against his owne promise. But yet it shall make no use in that case, nor he to whom the promise is made shall have no action in the Law upon that promise, though it be not performed, for it is called in the Law a nude or naked promise. And thus me thinketh that in the first case of the said two cases, the grant is now avoided in the law by the reentry of the feoffor, and that the feoffor is not bounden by his grant neither in law nor conscience, but in that second case he is bound so that the use passeth from him, as I have said before. D. I hold me content with thy conceit for this time, but I pray thee shew me somewhat more at large what is taken for a Nude contract or naked promise in the laws of England, and where an action may lye thereupon, and where not. St. I will with good will say as me thinketh therein.

Chap. 24.

¶ What is a Nude contract, or naked promise after the Laws of England, and whether any action may lye thereupon.

First it is to be understood, that contracts be grounded upon the customs of the realm, and by the law that is called jus gentium, and not directly by the law of reason, for where all things were in common, it needed not to have contracts,

tracts, but after property was brought in, they were right expedient to all people, so that a man might have of his neighbour that he had not of his owne, and that could not be lawfully but by his gift, by way of lending, concord, or by some lease, bargaine, or sale: and such bargaines and sales be called contracts, and be made by assent of the parties upon agreement betweene them, of goods, or lands, for money, or for other recompence, but of money usuall, for money usual is no contract. Also a concord is properly upon an agreement between the parties, with divers articles therein, some rising on the one part and some on the other, as if to at Stile letteth a Chamber to Henry Hart, and it is farther agreed betweene them, that the said H. Hart shall goe to boord with the said John at Stile, and the said Henry Hart to pay for the Chamber and boording a certaine summe, &c. this is properly called a concord, but it is also a contract, and a good action lyeth upon it. Howbeit it is not much argued in the Lawes of England what diversity is betweene a contract, a concord, a promise, a gift a lone, or a pledge, a bargaine a Covenant, or such other. For the intent of the Law is to have the effect of the matter argued and not the termes. And a nude contract is, where a man maketh a bargain, or a sale of his goods, or lands, without any recompence appointed for it: As if I say to another, I sell thee all my land, or all my goods, and nothing is assigned that the other shall give or pay for it, this is a nude contract, and as I take it, it is void in the law and conscience: and a nude

or naked promise is, where a man promiseth another to give him certaine money such a day, or to build an house, or to do him such certaine service, & nothing is assigned for the money, for the building, nor for the service: these be called naked promises, because there is nothing assigned why they should be made, and I thinke no action lyeth in those cases though they bee not performed. Also if I promise to another to keepe him such certaine goods safely to such a time, & after I refuse to take them, there lyeth no action against me for it. But if I take them and after they be lost or impayred through my negligent keeping, there an action lyeth. D. But what opinion hold they that be learned in the law of England in such promises that be called naked or nude promises: whether do they hold that they that make the promise, be bounden in conscience to performe their promise though they cannot be compelled thereto by the law, or not? S. The bookes of the Law of England entreat little thereof, for it is left to the determination of Doctors, and therefore I pray thee shew me somewhat now of thy mind therin, & then I shal shew thee therein somwhat of the minds of divers, that be learned in the law of the Realme. D. To declare the matter plainly after the saying of Doctors, it would aske a long time, and therefore I will touch it briefly to give thee occasion to desire to hear more therein hereafter. First thou shalt understand that there is a promise that is called an Avow, and that is a promise made to God, and he that doth make such a vow upon a deliberate minde intending to performe

forme it, is bound in conscience to do it, though it be onely made in the heart without expressing of words, and of other promises made to a man upon a certaine consideration, if the promise be not against the Law: as if A promise to give B. a. because he hath made him such an house, or hath let him such a thing, or such other like, I thinke him bound to keepe his promise. But if this promise be so naked, that there is no manner of consideration why it should be made, then I thinke him not bound to performe it, for it is to suppose that there were some errour in the making of the promise: but if such a promise be made to a University, to a City, to the Church, to the Clergy, or to poore men of such a place, or to the honour of God, or such other causes like, as for maintenance of learning, of the common wealth, or the service of God, or in relefe of poverty, or such other, then I thinke that he is bound in conscience to performe it, though there be no consideration of worldly profit, that the grantor hath had, or intended to have for it: and in all such promises it must be understood that hee that made the promise intended to be bound by his promise, for else commonly after all Doctors hee is not bound, unlesse he were bound to it before his promise: as if a man promise to give his father a gowne that hath need of it to keepe him from cold, and yet thinketh not to give it him, nevertheless he is bound to give it, for he was bound thereto before. And after some Doctors a man may bee excused of such a promise in conscience by casualty that commeth after the promise, if it be so that if he had

had knowne of the calumity at the making of the promise hee would not have made it. And also such promises if they shall bind, they must be honest, lawfull, and possible, and else they are not be holden in conscience, though there bee a cause, &c. And if the promise be good and with a cause, though no worldly profit shall grow thereby to him that maketh the promise, but onely a spirituall profit, as in the case before rehearsed of a promise made to an University, to a City, to the Church, or such other, and with a cause as to the honour of God, there is most commonly holden that an action upon those promises lyeth in the Law Canon. S. Whether dost thou meane in such promises made to an University, to a City, or to such other as thou hast rehearsed before, and with a cause as to the honour of God or such other, that the party shall be bound by his promise, if he intended not to be bound thereby, yea or nay? D. I thinke nay, or more then upon promises made unto common persons. Sib. And then me thinketh cleerely, that no action can lye against him upon such promises, for it is secret in his owne conscience, whether he intended for to be bound or nay. And if the intent inward in the heart, mans law cannot judge, and that is one of the causes why the Law of Godas necessary (that is to say) to judge inward things, and if an action should lye in that case in the Law Canon, then should the law Canon judge upon the inward intent of the heart, which cannot be as me seemeth. And therefore after divers that be learned in the laws of the Realme, all promises shall be taken in this

manner

manner, that is to say, if hee to whom the promise is made, have a charge by reason of the promise which he hath also performed; then in that case he shall have no action for that thing that was promised, though he that made the promise have no worldly profit by it. And if a man say to another, heale such a poore man of his disease, or make an high way, and I shall give thee thus much, and if he doe it, I think an action lyeth at the common law. And moreover though the thing that hee shall doe bee all spirituall, yet if hee performe it, I think an action lyeth at the common Law. As if a man say to another, Fast for me all the next Lent, and I shall give thee twenty pounds; and he performeth it, I think an action lyeth at the common law. And in like wise if a man say to another, Marry my daughter and I will give thee twenty pounds, upon this promise an action lyeth if he marry his daughter. And in this case he cannot discharge the promise though he thought not to be bound thereby, for it is a good contract and he may have [illegible], that is to say, the preferment of his daughter for his money. But in those promises made to an University or such other as that hath remembred before, with such causes as thou hast shewed, that is to say, to the honour of God, or to the increase of learning or such other like, where the party to whom the promise was made is bound to no new charge, by reason of the promise made to him, but as he was bound to before, there they thinke that no action lyeth against him, though he performe not

his

his promise, for it is no contract, and so his own conscience must be his judge whether he intended to be bound by his promise or not. And if he intended it not, then he offended for his dissimulation only; but if he be intended to be bound then if he performe it not, untruth is in him, and he proveth himselfe to be a lyer. Which is prohibited as well by the law of God as by the law of reason. And furthermore, many that be learned in the Lawe of England hold, that a man is as much bounden in conscience by a promise made to a common person, if he intended to be bound by his promise, as he is in the other case that thou hast remembred of a promise made to the Church, or the Clergy, or such other: for they say that as much untruth is in the breaking of the one as of the other: and they say that the untruth is more to be pondred, then the person to whom the promises be made. D. But what hold they if the promise be made for a thing past, as I promise thee L. for that thou hast builded me such a house, lyeth an action there? S. They suppose nay, but the shall be bound in conscience to performe it after his intent, as is before said. D. And if a man promise to give another xl. li. in recompence for such a trespasse that he hath done him, lyeth an action there? S. I suppose nay, & the cause is, for that such promises be no perfect contracts: for a contract is properly where a man for his money shall have by value of the other party certaine goods or some other profit at the time of the contract or after: but if the thing be promised for a cause that is past by way of recompence, then is it rather an accord

then

contract, but then the Rule is, that upon such a cond the thing that is promised by the covenant must be paid, or delivered in kind, for upon the action there lyeth no action. D. But in the case of trespasse whether hold they that he be bound by his promise, though he intended not to be bound thereby. S. They think nay, no more than in the other cases that be put before. Do. In the other cases he was not bound to that he promised but only by his promise, but in this case of trespasse, he was bound in conscience before the promise to make recompence for the trespasse: and therefore it seemeth that he is bound in conscience to keep his promise, though he intended not to be bound thereby.

S. Though hee were bound before the promise to make recompence for his trespasse, yet he was not bound to no summe in certain but by his promise: and because that the Summe may be too much or too little, and not equall to the trespasse, and that the party to whom the trespasse was done notwithstanding the promise is at liberty to take his action of trespasse if hee will, therefore they hold that hee may bee his owne Judge in Conscience, whether he intended to be bound by his promise or not, as he may in other cases, but if it were of a debt, then they hold that he is bound to performe his promise in conscience. Doct. What if in the case of Trespasse he confirmeth his promise with an oath. S. Then they hold that he is bound to performe it for saving of his oath though hee intended not to be bound, but if he intended to be bound by his promise, then they say, that

as oath needeth not but to inforce the promise, for they say, he breaketh the Law of reason, which is that he may do nothing against the truth, at least when he breaketh his promise that he thought in his owne heart to be bound by, as he doth when he breaketh his oath, though the offence be not so great by reason of the perjury. Moreover to that thou saiest that upon such promises that thou hast rehearsed before, shall lye an action after the Law Canon, verily as to that in this Realme there can no action lye thereon in the Spirituall Court, if the promise be of a temporall thing, on a prohibition, or a Præmunire facias should lye in that case. D. That is marvell sith there can no action lye thereon in the Kings Court as thou saist thy selfe. Sc. That maketh no matter, for though there lye no action on in the Kings Court, against executors upon a simple contract, yet if they bee sued in that case for the debt in the spirituall Court, a prohibition lyeth. Sub in like wise if a man wage his Law untruly in an action of debt upon a contract in the Kings Court, yet he shall not be sued for the perjury in the spirituall Court, and yet no remedy lyeth for the perjury in the Kings Court: for the Prohibition lyeth not onely, where a man is sued in the Spirituall Court of such things, as the party may have his remedy in the Kings Court, but also where the spirituall Court holdeth plee in such case, where they by the Kings prerogative, and by the ancient custome of the Realme ought none to hold. Doct. I will take advisement upon that thou hast said in this matter, till another

time,

tize, and I pray thee now proceed to another question.

§ The twentieth question of the Student.

Chap. 25.

A Man hath two sons, one borne before espousein, and the other after espousein, and the father by his will bequeathath to him sonne and heire all his goods, which of these two sons shall have the goods in conscience? As I said in our first dialogue in Latin the last chap. the doubt of this case dependeth not in the knowing what conscience will in this case, but rather in the knowing which of the sonnes shall be judged heire (that is to say) whether he shall be taken for heire that is heire by the spiritual Law, he that is heire by the Law of the Realme, or else that it shall be judged for heire that the father woke for heire? &c. As to that point, admit the fathers mind not to be known, or else that his mind was that he should be taken for heire that should be judged for heire by the Law, that in this case it ought to be judged by. And then I pray thee shew me thy minde therein? for though the question be not directly depending upon the point to see what conscience will in this case, yet it is right expedient for the well ordering of conscience, that it be known after what law it shall be judged, for if it ought to be judged after the temporall law who would be heire, therein were against conscience if the Judges in the spiritual law should

Judgeshim for heire that is heire by the spiri-
tuall Law. and I think they should be bound
to Restitution thereby, and therefore I pray
thee shew me thine opinion, after what Law
it shall judged. D. Me thinketh that in this case
it shall be judged after the Law of the Church,
for it appeareth that the bequest is of goods,
and therefore if any suite shall be taken upon the
execution of the will for the bequest, it must be
taken in the spirituall Court, and when it
is depending in the Spirituall Court, me thin-
keth it must be judged after the Spirituall law:
for of the temporall law they have no know-
ledge, nor they are not bound to know it as me
thinketh, and more stronger not to Judge af-
ter it. But if the bequest had been of a chattell
reall, as of a lease for terme of yeares, or of a
ward, or such other: then the matter should
have come in debate in the Kings Court, and
then I thinke the Judges there should judge
after the Law of the Realme, and that is, that
the yonger brother is heire. and so me thinketh
the diversity of the Courts shall make the di-
versity of judgement. Stu. Of that might follow
a great inconvenience as mee seemeth, for it
might be such a case that both chattels reall and
chattels personall were in the will, & then after
thine opinion the one sonne should have the chat-
tels personall, and the other sonne the chattels
reall, and it cannot be conveniently taken as me
thinketh, but that the fathers will was, that
the one sonne should have all, and not be dibi-
ded. Therefore me thinketh that he shall be judge-
d for heire that is heire by the Common law:

and

and that the Judges Spirituall in this case be bound to take notice what the common Law is, for sith the things that be in bariance bee temporal, that is to say, the goods of the father: it is reason that the right of them in this Realme, shall be determined by the Law of the Realme, O how may that be? for the Judges spirituall know not the Law of the Realme, ne they cannot know it as to the most part of it: for much part of the law is in such speech that few men have knowledge of it: & there is no meanes, ne familiarity of study betweene them that learne the said Laws: for they be learned in severall places, and after divers waies, and after divers manners of teachings, and in divers speeches, and commonly the one of them have none of the Bookes of the other: and to bind the spirituall Judges to give Judgement after the Law that they know not, ne that they cannot come to the knowledge of it, seemeth not reasonable. Sir. They must doe therein as the Kings Judges must do, when any matter commeth before them that ought to bee judged after the Spirituall Law, whereof I put divers cases in our first Dialogue in English the vii. Chapter, that is to say, they must either take knowledge of it by their own study, or els they must enquire of them that be learned in the law of the Church, what the law is, and in like wise must they doe. But it is to doubt, that some of them would be loath to aske any such question in such case, or to confesse that they are bound to give their judgement after the temporall law, and surely they may rightly offend their conscience.

Q. I suppose that some be of opinion that they are not bound to know the law of the realm, and verily to my remembrance I have not heard that Judges of the spiritual law are bound to know the law of the realm.

A. And I suppose that they are not onely bound to know the Law of the Realme, or to do that in them is to know it, when the knowledge of it openeth the right of the matter that dependeth before them, but that they be also bound to know where and in what cases they ought to judge after it. for in such cases they must take the Kings Law as the Law spiritual to that point, and are bound in conscience to follow it as it may appear by divers cases, whereof one is this. Two Jointenants bee of goods, and the one of them by his last will bequeatheth all his part to a stranger, and maketh the other Jointenant his Executor, and dyeth if he to whom the bequest is made, sue the other Jointenant, upon the legacy as executor &c. Upon this matter shewed, the Judges of the Spiritual Law are bound to judge the will to be void, because it is void by the Law of the Realme, whereby the Jointenant hath right to the whole goods by the title of the Survivor, and is judged to have the goods as by the first gift which is before the title of the Will, and must therefore have preferment as the eldest title, and if the Judges of the Spiritual Court judge otherwise, they are bound to restitution: and by the reason the Executor of a man that is outlawed at the time of his death may discharge themselves in the

Spirituall Court of the performing of legacies, because they be chargeable to the King, and yet there is no such law of utlagery in the Spirituall Law.

D. By occasion of that then hast said before I would aske of thee this question. If a Parson of a Church alien a portion of Dismes according as the Spirituall law hath ordained, is not that alienation sufficient, though it hath not the solemnities of the temporall Law? Stu. I am in doubt therein if the portion be under the fourth part of the value of the Church: but if it be to the value of the fourth part of the Church, or above, it is not sufficient, and therefore was the writ of right of Dismes ordained: and if in a writ of right of Dismes it be judged in the Kings Court for the Patron of the successor of him that alieneth, because the alienation was not made according to the common law, then the Judges of the spirituall law, are bound to give their judgement according to the judgement given in the Kings Court. And in like wise if a Parson of a Church agree to take a pension for the tythe of a Mill, if the pension bee to the fourth part of the value of the Church or above, then it must be aliened after the solemnities of the Kings Laws, as lands, and tenements must, or else the Patron of the successor of him that alieneth, may bring a writ of right of Dismes, and recover in the Kings Court, and the then Judges of the spirituall Court are bound to give judgement in the Spirituall Courts according as is aforesaid. D. I have heard say, that a writ of right of Dismes is

given by the Statute of West. 2. and that speaketh onely of Dismes and not of Pensions. &c. Where a Parson of a Church is wrongfully deforced of his Dismes, and is let by an Indicavit to sue his Dismes in the Spirituall Court, then the Patron may have the writ of Right of Dismes by the Statute that thou speakest of; for there lay none at the common law, for the Parson had there good right, though he were let by the Indicavit to sue for his right. But when that Parson had no remedy at the Spirituall law, there a writ of right of Dismes lay for the Patron by the common law, aswell of pensions as of dismes, and some say that in such a case it lay of lesse then of the fourth part by the common Law, but that I passe over. And the reason why it lay at the common Law, of the Dismes or Pensions were above the fourth part, &c. was this: by the spirituall law the alienation of the Parson with the assent of the Bishop and of the Chapter shall barre the successor without assent of the Patron, and so the Patron might lose his patronage and be not assenting thereto: for his Incumbent might have no remedy but in the spirituall Court, and there he was barred, wherefore the Patron in that case shall have his remedy by the common law where the assent of the Ordinary and Chapter without the Patron shall not serve, as it is said before. But where the Incumbent had good right by the spirituall Law, there lay no remedy for the Patron by the common law; though the Incumbent were let by an Indicavit, and for that cause was the said Statute made, and it

lieth as well by the equity for offerings and pensions, as for Dismes. Then further I would thinke that where the Spirituall Court may hold plea of a temporall thing, that they must judge after the temporall Law: and that ignorance shall not excuse them in that case: for by taking of their office they have bound themselves to have knowledge of as much as belongeth to their office, as all Judges be, spirituall, or temporall. But if it were in argument in this case, whether the eldest sonne might be a Priest because her is a bastard in the temporall Law, that should be judged after the spirituall Law, for the matter is spirituall. Yet notwithstanding all the reasons that thou hast made, I cannot see how the Judges of the spirituall Law, shall be compelled to take notice of the temporall law, seeing that the most part of it is in the French Tongue, for it were hard that every spirituall Judge should be compelled to learne the Tongue. But if the Law of the Realme were set in such order that they that intend to study the Law Canon, might first have a sight of the Law of the Realme, as they have now of the Law Civill: and that some Books and Treatises were made of cases of conscience concerning these two Laws, as there be now concerning the Law Civill & the law Canon, I would assent that it were right expedient, and then reason might serve the better, that they should be compelled to take notice of the Law of the Realm as they be now bound in such countries as the Law Civill is used to take notice of that Law.

Sc. Me thinketh thine opinion is right good and reasonable, but till such an order be taken they are bound as I suppose, to enquire of them that be learned in the common Law, what the Law is, and so to give their judgement according, if they will keepe themselves from offence of conscience. And forasmuch as thou hast well satisfied my mind in all these questions before, I pray thee now that I may somewhat feele thy mind in divers articles that be written in divers bookes for the ordering of conscience upon the Law Canon and Civill: for me thinketh that there be divers conclusions put in divers books, as in the Summes called Summa Angelica, and Summa Rosella, and divers other, for the good order of conscience, that be against the Law of this Realm and rather blind conscience, then do give any light unto it.

Do. I pray thee shew me some of those cases,

St. I will with good will.

§ Whether an Abbot may with conscience present to an Advowson of a Church that belongeth to the house without assent of the Covent.

Chap. 26.

IT appeareth in the Chapter, Et agnoscitur de his quae sunt à praelatis, the which Chapter is recited in the summe called Summa Angelica, in the title Abbas, the xxii. article, that he may not without any custome, or any speciall

privi-

priuiledge to help therein. St. Truth is it, that there is such a decretall, but they that be learned in the law of England, hold the decretall bindeth not in this Realm, and this is the cause why they doe hold that opinion: By the Law of the Realme the whole disposition of Lands and goods of the Abbey to the Abbots only for the time that he is Abbot, and not to the Covent: for they bee but as dead persons in the Law, and therfore the Abbot shall sue and be sued only without the Covent, doe homage, fealty, attorne, make leases, and present to advowsons only in his owne name: and they say further, that this authority cannot be taken from him, but by the Law of the Realme, and so they say, that the makers of the decretall exceedeth their power: wherefore they say it is not to be holden in conscience. no more then if a Decree were made that a lease for terme of yeares or at will made by the Abbot without the Covent should be immediately voyde: so they thinke that the Abbot may in this case present in his owne name without offence of conscience, because the said decretall holdeth not in this Realme. D. But many be of opinion that no man hath authority to present in right and conscience to any benefice with Cure but the Pope, or hee that hath his authority thereto derived from the Pope: for they say that forasmuch as the Pope is the Vicar generall under God, and hath the charge of the soules of all people that be in the flocke of Christs Church, it is reason that sith hee cannot minister to all, no more is it necessary to all people for their

soules

soules health in his owne person, that he shall assigne deputies for his discharge in that behalfe: And because Patrons claime to present to Churches in this Realme by their owne right, without Title derived from the Pope, they say that they usurpe upon the Popes authority: and therefore they conclude that though the Abbot have title by the Law of the Realme to present in this case in his owne name, that yet because that title is against the Popes prerogative that that title, no yet the Law of the Realme that maintaineth that title, holdeth not in conscience. And they say also that it belongeth to the Law Canon to determine the right of presentment to benefices, for it is a thing spirituall and belongeth to the Spirituall jurisdiction, as the deprivation from a benefice doth: and so they say the said Decretall bindeth in conscience, though in the Law of the Realm it bindeth not. Sir As to the first consideration I would right well agree that if the Patrons of Churches in this Realme claimed to put incumbents into such Churches as should fall void of their Patronage without presenting them to the Bishop, or if they claimed that the Bishop should admit such incumbent as they should present without any examination to be made of his ability in that behalfe, that that claime were against reason and conscience for the cause that thou hast rehearsed: But forasmuch as the Patrons in this Realme claime no more but to present their Incumbents to the Bishop, and then the Bishop to examine the ability of the Incumbent, and if he find him

by

by the Examination not able to have cure of soules, he then to refuse him and the Patron to present another that shall be able, and if he be able, then the Bishop to admit him, institute him and induct him I think that this claim and their presentments thereupon stand with good reason and conscience. And as to the second consideration it is holden in the Lawes of the Realme that the right of presentment to a Church, is a temporall inheritance, & shall descend by course of inheritance from heire to heire as lands and tenements shall, & shall be taken as an assets as lands and tenements be: and for the triall of the right of patronages bee obtained in the Law diverse actions for them that be wronged in that behalfe as Writs of right of Advowson, Assise of Darrein presentment, Quare impedit, and divers other which alway without time of mind have been pleaded in the Kings Courts, as things pertaining to his Crowne and royall dignity: and therefore they say that in this case his lawes ought to be obeyed in Law and conscience. D. If it come in variance whether her that is so presented bee able or not able by whom shall the ability be tryed? S. If the Ordinary be not party to the action it shall be tryed by the Ordinary and if he be party it shall be tryed by the Metropolitan &c. Then the Law is more reasonable in that point than I thought it had been: but in the other point I will take advisement in it till another time, and I pray thee shew me thy mind in this point: If an Abbot name his covent with him in his presentation, doth that make the presentation bold

void in the Law, or is the presentation good that notwithstanding?

Stu. I think it is not void therefore, but the meaning of them is void and a thing more then needeth. For if the Abbot be disturbed, he must bring his action in his own name without the Covent. D. Then I perceive well that it is not prohibited by the Law of England, but that the Abbot may name the Covent in his presentation with him, and also take their assent whom he shall present if he will: and then I hold it the surest way, that he so do, for in so doing he shall not offend neither in Law, nor in Conscience. St. To take the assent of the Covent whom he shall present, and to name them also in the presentation, knowing that he may doe otherwise, both in Law and Conscience if he will, is no offence: but if he take their assent or name them with him in the presentation, thinking that he is so bound to do in Law and conscience letting a conscience where none is, and regardeth not the Law of the realm, that will discharge his conscience in this behalfe, if he will, so that he present an able man as he may doe without their assent, there is an error and offence of Conscience in the Abbot. And in like wise if the Abbot present in his owne name, and therefore the Covent saith that he offendeth in Conscience, in that he observeth not the Law of the Church, for that he taketh not their assent, then they offend in judging him to offend that offendeth not. And therefore the best way in this case to judge both the said Laws of such effect as they be, and not to set an offence

of

of conscience by breaking of the said decree, which standeth not in effect in this behalf within this Realm.

§ If a man find beasts in his ground doing hurt, whether may he by his own authority, take them and keep them till he be satisfied of the hurt.

Chap. 27.

This question is made in the summe called Summa Roselta, in the title of Restitution, that is to say, Restitutio 13. the 9. Article, and there it is answered, that he may not take them for to hold them as a pledge till hee be satisfied for the hurt: but that he may take them and keepe them till he know who oweth them, that hee may thereby learne against whom to hade his remedy. Is not the Law of the realm so in like wise? S. No verily, for by the Law of the Realme, he that in that case hath the hurt may take the beasts as a distresse, and put them in a pound Overt, so it be within the same Shire, and there let them remaine till the owner will make him amends for the hurt. D. What callest thou a pound Overt? Stu. A pound Overt is not onely such a pound as is commonly made in Townes and Lordships, for to put in beasts that be distrained, but it is also every place where they may be in lawfully, not making the owner an offendor for their being there: And that it be there also, that the

owner

owner may lawfully give the beasts meat and drink while they be in pound.

D. And if they die in pound for want of meat whose jeopardy is it? S. If it be such a pound where as I speake of, it is at the perill of him that oweth the beasts, so that he that had the hurt shall be at liberty to take his action for the trespasse if he will: and if it be not a lawfull pound, then is it at the perill of him that distrained, and so it is if he drive them out of the shire and they dye there.

D. I put case that he that oweth the beasts, offer sufficient amends, and the other will not take it, but keepeth the beasts still in pound, may not the owner take them out? S. No, for he may not be his owne judge, and if he doe, an action lyeth against him for breaking of the pound: but he must sue a Replevin to have his beasts delivered him out of the pound, and thereupon it shall be tryed by 12. men, whether the amends that was offered were sufficient or not, and if it be found that the offer was not sufficient, then he that hath the hurt shall have such amends as the 12. men shall assesse. D. If it be found by the 12. men, that the amends were sufficient, shall he that refuseth to take it, have no punishment for his refusall; and for keeping of the beasts in pound after that time? S. I thinke no, but that he shall yeild damages in the Replevin, because the issue is tryed against him.

D. I put case that the beasts after the refusall dye in pound for lack of meat, at whose jeopardy is it then? S. At the jeopardy of him that

owed

owed the beasts, as it was before: for he is bound at his perill by reason of the wrong that was done at the beginning, to see that they have meat as long as they shall be in pound, unless the Kings writ come to deliver them, and he refuseth it: for after that time it will be at his jeopardy if they dye for lack of meat, & the damages shall be recovered in an action brought upon the Statute for disobeying the Kings writ.

§ Whether a gift made by one under the age of xxv. yeares be good.

Chap. 28.

It appeareth in Summa Angelica in the title Donatio prima the 7. article, that a man before the age of 25. yeares may not give without it be with the authority of his tutor: If it not so likewise at the common Law or &c. The age of Infants to give or sell their lands and goods in the Law of England is at 21 years or above, so that after that age the gift is good, and before that age it is not good, by whose assent soever it be, except it be for his meat, and his drinke or apparell, or that he do it as executor, in performance of the will of his testator, or in some other like cases, that need not to bee rehearsed here: and that age must bee observed in this realm in lawe & conscience, & not the said age of 25 yeer. D. If yet case it were ordained by a decree of the Church, that if any man by his will bequeathed goods to another, and willeth that they

shall be delivered unto him at his full age, & that in that case 25. years shall bee taken for the full age, shall not that decree be observed and stand good after the law of England? S. I suppose it shall not; for though it belong to the Church to have the probate and the execution of Testaments made of goods & chattels, except it be in certain Lordships & seigniories that have them by prescription, yet the Church may not as me seemeth determine what shall be the lawful age for any person to have the goods, for that belongs to the King & his laws to determine: & therefore if it were ordained by a statute of the Realme, that he should not in such case have the goods till he were of the age of 25. years, that stat. were good & to be observed aswel in the spiritual law as in the Law of the Realm; and if a stat. were good in that case, then a decree made thereof is not to be observed, for the ordering of the age may not be under two severall powers, and the property of every good law of man is, that the maker exceed not his authority: and I think that the spirituall Judge in that case ought to judge the full age after the Law of the Realm, seeing that the matter of the age concerneth temporall goods: and I suppose farther, that as the King by authority of his Parliament may ordaine that all wills shall be void, & that the goods of every man shall be disposed, in such manner as by statute should be assigned, that more straunge he may appoint at what age such wills as be made shall bee performed. D. Thinkest thou then that the King may take away the power of the Ordinary, that he shall not call executors

to

to accompt: S. I am somewhat in doubt therein, but it seemeth that if it might be enacted by statute that all wills should be void, as is aforesaid, that then it might be enacted, that no man should have authority, to call none to accompt upon such wills, but such as the statute shall therein appoint, for he that may doe the more, may do the lesse: notwithstanding I will nothing speake determinatly in that point at this time, no I meane not that it were good to make a statute that all wills shall be void, for I think them right expedient, but mine intent is, to prove that the common law may obtain the time of the full age, aswell in wills of temporall things as otherwise, and also, that wills shall be made. And if it may so doe, then much stronger it belongeth to the Kings Lawes to interpret wills concerning temporall things, aswell when they come in argument before his Judges as when they come before the spirituall Judges, and that they ought not to bee judged by several lawes (that is to say) by the spirituall Judges in one manner, and by the Kings Judges in another manner.

S If a man be convict of heresie before the Ordinary, whether his goods be forfeited.

Chap. 29.

IT appeareth in Summa Angelica, in the title Donatio prima the 13. article, that he that is an heretike may not make executors, for in the

law his goods be forfeit: What is the law of the realme therein? S. If a man be convict of hereſie and abiure, hee hath forfeited no goods, but if he be convict of hereſie, & be deliuered into lay-mens hands, then hath he forfeit all his goods that he hath at that time that he is deliuered unto them, though he be not put in execution for the hereſie: but his lands he ſhall not forfeit, except he be dead for the hereſie, & they be ſhal forfeit them, to the Lords of the fee, as in caſe of felony, except they be holden of the Ordinary, for then the King ſhall haue the forfeiture, as it appeareth by a ſtatute made the ſecond yeere of H. 7. chap. 7. D. Me thinketh that as it belongeth onely to the Church to determine hereſies, that ſo it belongeth to the Church to determine what puniſhment hee ſhall haue for his hereſie, except death, which they may not be iudges in: but if the Church decree, that he ſhall therefore forfeit his goods, me thinketh that they be forfeit by that decree. S. May bee ſo, for they be temporall, and belong to the iudgement of the Kings Court, and I thinke the Ordinary might haue ſet no fine upon one impeached of hereſie, till it was ordained by the Statute of H. 4. that he may ſet a fine in that caſe if he ſee cauſe and then the King ſhall haue that fine, as in the ſaid ſtat. appeareth.

§ Where diuers Patrons of an Advowſon, and the Church voideth, the Patrons vary in their preſentments, whether the Biſhop ſhall haue liberty to preſent which of the incumbents that he will, or not.

Chap.

Chap. 30.

This question is asked in Summa Rosella, in the title Patronatus the 9. article, & there is appeareth by the better opinion, that he may present whether cleric he will, howbeit the master of the said sum saith, by the rigor of the law, the Bishop in such case may present a stranger, because the patrons agree not: and in the same chap. Patronatus the 15. article, it is said, that he must be preferred that hath the most merits and hath the most part of the Patrons: and if the number be legall, that then it is to consider the merits of the Patron, and if they be of like merit, then may the Bish. command them to agree & to present again. And if they cannot yet agree, then the liberty to present is given to the Bishop to take which he will & if he may not yet present without great trouble, then shall the Bish. order the Church in the best manner he can: & if he cannot order it, then shall he suspend the Church, & take away the relicks to the rebukes of the patrons: and if they will not so be ordered, then must he ask help of the temporality: and in the 15 article of the said title Patronus, it is asked, whether it be expedient in such case, that the more part of the Patrons agree, having respect to all the patrons, or that it sufficeth to have the more part in comparison of the lesse part, as thus: There be four Patrons to present one Clerke, the first and second present one, the third presenteth another, and the fourth another, her that is presented by 2 hath not the more part in comparison of all the Patrons, for they be legall, but he hath the more part having respect to

the other presentments: to this question it is answered, that either the presentment is made of them that be of the colledge, & there is requisit the more part having respect to all the colledge, or else every man presenteth for himselfe, as commonly do lay-men that have the patronage of their patrimony, and then it sufficeth to have the more part in respect of the other parties. doth not the law of England agree to these diversities? S. Verily D. what order then shall be taken in the law of England if the patrons vary in their presentments? S. After the Lawes of England this order shall be taken: If they be joyntenants, or tenants in common of the patronage, & they vary in presentment, the Ordinary is not bound to admit any of their clerks neither the more part nor the lesse & if the 6. months pass or they agree, then he may present by the laps, but he may not present within the 6 months, for if they do, they may agree and bring a Quare imp. against him, & remove his clerk & so the Ordinary shall be a disturber: and if the patrons have the patronage by descent as coparceners, then is the Ordinary bound to admit the clerk of the eldest sister, for the eldest shall have the preferment in the law, if he will, & then at the next avoidance the next sister shall present, and so by turn one sister after another, till all the sisters or their heires have presented, & then the eldest sister shall begin againe: and this is called a presenting by turne, & it holdeth alway betweene coparceners of an advowson except they agree to present together, or that they agree by composition to present in some other manner, and if they do so, the agree-

agreement must stand: but this must be alway except, that if at the first avoidance that shall be after the death of the common ancestor, the King have the ward of the youngest daughter, that then the King by his prerogative shall have the presentment, and at the next avoidance the eldest sister, and so by turne. But it is to understand that if after the death of the common ancestor the Church voideth, and the eldest sister presented together with another of the sisters, and the other sisters every one in their owne name as together, that in that case the ordinary is not bound to receive none of their clerks, but may suffer the Church to run into the laps, as it is said before: for he shall not be bound to receive the clerk of the eldest sister, but where she presenteth in her owne name. And in this case where the patrons vary in presentment, the Church is not properly said Litigious, so that the Ordinary should be bound at his perill to direct a writ to inquire de jure patronatus: for that writ lyeth where 2. present by severall titles, but these patrons present all in one title, and therefore the ordinary may suffer it to pass, if he will into the laps: and this manner of presentments must be observed in this realme in law and conscience.

§ How long time the Patron shall have to present to a benefice.

Chap. 31.

This question is asked in Summa Angelica in title Jus patronat' the 16. article, and there it is answered, that if the patron be a layman, that he shall have 4. monthes, and if he be a

Clerke, he shall have 6. months. S. And by the common law hee shall have 6. months whether he be a lay man or a Clerke, and I see no reason why a Clerk should have more respit then a lay man, but rather the contrary. D. From what times shall the 6. months be accompted? S. That is in divers maners after the manner of the avoidance; for if the Church void by death, creation, or cession, the 6. months shall be counted from the death of the incumbent, or from the creation, or cession, whereof the Patron shall be compelled to take notice at his perill. & if the voidance be by resignation or deprivation, then the 6. months shall begin when the Patron hath knowledge given him by the Bishop of the resignation or deprivation. D. What if he have knowledge of the resignation or deprivation, and not by the Bishop, but by some other, shall not the 6 months begin then from the time of that knowledge? S. I suppose that it shall not begin till hee have knowledge given him by the Bishop. D. An union is also a cause of voidance, how shall the 6. months bee reckoned there? S. There can no union be made but the Patrons must have knowledge, and it must bee appointed who shal present after that union, that is to say, one of them or both either jointly or by turne one after another, as the agreement is upon the union, and sith the Patron is privy to the avoidance and is not ignorant of it, the 6. months shall bee accompted from the agreement. Doct. I see well by the reason that thou hast made in this chapter, that ignorance sometime excuseth in the Law of England, for in some

some of the said avoidances it shall excuse the Patrons, as it appeareth by the reasons above, and in some it shall not: wherefore I pray thee shew me somewhat where ignorance excuseth in the Law of England, and where not after thine opinion. &c. I will with good will here-after doe as thou seest if thou put me in remembrance thereof. But I would yet move thee somewhat further in such questions as I have moved thee before, concerning the diversities between the Laws of England and other laws: for there be many more cases thereof, that as me seemeth have right great need, for the good order of conscience of many persons, to be reformed, and to be brought into one opinion both among spirituall and temporall: as it is in the case where Doctors hold opinion, that the Statute of lay men that restraine liberty to give lands to the Church should be void, and they say farther, that if it were prohibit by a stat. that no gift should be made to forreiners that yet a gift made to the Church should be good, for they say that the inferior may not take away the authority of the superior; and this saying is directly against the Statutes, whereby it is prohibit, that lands should not bee given into Mortmain: & they say also that bequests & gifts to the Church must be determined after the Law Canon, and not after the laws & statutes of laymen, and so they regard much to whom the gift is made. whether to the Church, or to make causwaies, or to common persons, & beare more favor in gifts to the Church then to other: and the law of the Realme beholdeth the thing that is given

Given and pretended, that if the thing that is Given, be of lands or goods, that the determination thereof of right belongeth to the Realme to the Kings lawes, whether it be to spirituall men, or temporall, to the Church, or to other, and so is great division in this behalfe, when one preferreth his opinion, and another his. and one this jurisdiction, and another that, and that as it is to feare more of singularity then of charity: wherefore it seemeth, that they that have the greatest charge over the people specially to the health of their soules, are most bound in conscience before other to look to this matter, and to do that in them is in all charity to have it reformed not beholding the temporall jurisdiction nor spirituall jurisdiction, but the common wealth, and quietnesse of the people: and that undoubtedly would shortly follow, if this division were put away, which I suppose verily will not be, but that all men within the realm both spirituall and temporal be ordered and ruled by one law, as to temporal things: notwithstanding forasmuch as the purpose of this writing is not to treat of this matter, therefore I will no farther speake therofat this time. D Then I pray thee proceed to another question, that thou saist thy mind is to do. S. I will with good will.

§ If a man be excommenged, whether he may in any case be assoiled without making satisfaction.

Chap. 27.

IN the summe. called Summa Rosella, in the title Absolutio quarta, the second article it is said,

said, that he that is excommunicat for a wrong, if he be able to make satisfaction, ought not to be assoiled but he do satisfie, and that they offend that do assoile him, but yet nevertheless he is assoiled, and if he be not able to make amends that he must yet be assoiled, taking a sufficient gage to satisfie if he be able hereafter, or else that he make another to satisfie if he be able. And these sayings in many things hold not in the Laws of England. D. I pray thee shew me wherein the law of the Realme varieth therefore Sr. If a man be excommunicat in the spirituall court for debt, trespasse, or such other things as belong to the Kings crowne, and to his royall dignity, there he ought to be assoiled without making any satisfaction, for the spirituall Court exceedeth their power in that they weld plee in those cases, and the party if he will may thereupon have a Præmunire facias, aswell against the party that sued him, as against the Judge: and therefore in this case they ought in conscience to make absolution without any satisfaction, for they not onely offended the party in calling him to answer before them of such things as belong to the law of the realme, but also the King: for he by reason of such suites, may lese great advantages, by reason of the writs, originals, judicials, fines, amerciaments, and such other things as might grow to him if suits had been taken in his courts according to his laws: & according to this saying it appeareth in divers statutes, and if a man lay violent hands upon a clerk, and beat him that for the beating amends shall be made in the Kings court, & for the laying

of

of violent hands upon the Clerk, amends shall be made in the Court Christian. And therefore if the Judge in the Court Christian would award the party to yeild damages for the beating, hee did against the statute. But admit that a man be excommenged for a thing that the spirituall Court may award the party to make satisfaction of, as for the not inclosing of the Churchyard, or for not appareiling of the Church conventently: Then I think the party must make restitution, or lay a sufficient caution if hee bee able or he be allowed: but if the party offer sufficient amends, and have his absolution, & the Judge will not make him his letters of absolution, if the excommengement be of Record in the Kings Court, then the King may write unto the spirituall Judge, commanding him that he make the party his Letters of absolution upon paine of contempt: and if the said excommunication be not of Record in the Kings Court, then the party may in such case have his action against the Judge spirituall, for that he would not make him his Letters of absolution: but if he be not allowed, or if he be not able to make satisfaction, and therefore the Judge spirituall will not allowe him, what the Kings Lawes may doe in this case I am somewhat in doubt, and will not much speak of it at this time, but as I suppose he may as well have his action in that case for the not allowing him as where he is allowed, and that the Judge will not make him his Letters of absolution: and I suppose the same law to be where a man is accused for a thing that the Judge had no power to accuse

him

him, as for Debt, trespasse or such other, D. There he may have other remedies, as a Præmunire facias, or such other, and therefore I suppose the other action lyeth not for him.

Sr. The Judge and the party may be dead, & then no Præmunire lyeth, and though they were alive, and were condemned in præmunire, yet that should not avoid the excommengement: and therefore I think the action lyeth, especially if he be thereby delayed of actions that he might have in the Kings Court, if the said excommengement had not been.

33 Whether a Prælat may refuse a Legacy.

Chap. 33.

IT is moved in the said summe named Rosella, in the title Alienatio 20. the 11. article, whether a prelate may refuse a Legacy, wherein diers opinions bee recited there, which as me thinketh have need after the Laws of the Realm to be more plainly declared. D. I pray thee shew me what the law of the Realm will therein. Sr. I think that every Prelate and soveraign that may onely sue, and be sued in his owne name, as Abbots, Priors, and such other, may refuse any legacy that is made to the house: for the legacy is not perfect till he to whom it is made assent to take it, for else if he might not refuse it, he might bee compelled to have lands whereby he might in some case have great losse

but

but then if he intend to refuse, he must as soone as his title by the legacy falleth, relinquish to take the profits of the things bequeathed, for if one take the profits thereof, he shall not after refuse the Legacy: but yet his successor may if he will refuse the taking of the profits to save the house from yeilding damages, or from arrearages of rents if any such be: and like law is of remainder, as is in legacy; for though in the case of a remainder, and also of a devise, as most men say, the freehold is cast upon him by the Law when the remainder or devise falleth: yet it is in his liberty to refuse the taking of the profits, & so refuse the remainder if he will as he might do of the gift of lands, or goods, for if a gift be made to a man that refuseth to take it, the gift is void: & if it be made to a man that is absent, the gift taketh no effect in him till he assent: no more then if a man disseise one to another mans use, hee to whose use the disseisin is made, hath nothing in the land, ne is no disseisor till he agree: And to such disseisins and gifts, an Abbot or Prior may disagree as well as any other man. But after some men a Bishop of a devise, or remainder that is made to the Bishop, and to the Deane and Chapter, nor a Deane and a Chapter of a devise, and remainder made to them, ne yet the Master of a Colledge of such a devise, or remainder made to him and his brethren, may not disagree without the Chapter or brethren: for the Bishop of such land as hee hath with the Deane and Chapter: ne the Deane nor master of such land as they have with the Chapter or brethren may not answer without

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the Chapter and brethren: and therefore some say that if the Dean or Master will refuse, or disclaime in the lands that they have by the devise or remainder, that disclaimer without the chapter or brethren is void. And therefore it is holden in the Law, that if a Bishop be vouched to warrant, and the tenant hindereth him to the warranty by reason of a lease made to him by the Bishop and by the Deane and the Chapter, yelding a rent, that in that case the Bishop may not disclaime, in the reversion without the assent of the Deane and Chapter: but yet if a reversion were granted to a Dean and a Chapter, and the Deane refuse, the grant is void. And so it appeareth that the Deane may refuse to take a gift or grant of lands, or goods, or of a reversion made to him and to the Chapter, and yet he may not disagree to a remainder, or devise, and the diversity is because the remainder and devise be cast upon him without any assent, wherepon neither the Dean nor the Chapter by themselves may in no wise disagree without the assent of the other: But a gift or grant is not good to them without they both assent, and in such gifts, as I suppose, an Infant may disagree as well as one of full age, but if a woman covert disagree to a gift, and the husband agree that gift is good D. What if the lands in that case of a man and his wife be charged with damages, or be charged with more rent then the land is worth, and the husband die, shall the wife be charged to the damages, or to the rent? Sr. I thinke nay, if the wife refuse the occupation of the ground after her husbands death,

and

and I think the same is to be, if a lease be made to the husband and the wife, yielding a greater rent then the land is worth, that the wife after the husbands death may refuse the Lease to save her from the payment of the rent, so may the successor of an Abbot Do. And if the husband in that case survive the wife, & then make his executors and dye, whether may his executors in like sort refuse the lease? S. If they have not goods sufficient of their testator to pay the rent, I think they may not refuse it: but if they have not goods sufficient of their testator to pay the rent to the end of the term, I think if they peaceably quietly the occupation, they may by special pleading discharge themselves of the rent & the lease, and if they do not, they may lightly charge themselves of their owne goods. And if a lease be made for terme of life the remainder to an Abbot for terme of life of J. at S. reserving a greater rent then the land is worth, & after the tenant for terme of life dyeth, the Abbot may refuse the remainder for the cause before rehearsed: and in case that the Abbot assent to the remainder, whereby he is charged to the rent during the time that he is Abbot, and after he dyeth, or is deposed living the said J. at S. in that case his successor may discharge himselfe by refusing the occupation of the land, as is aforesaid. But I think that if such a remainder were made to a Deane, and to the Chapter, and the Deane agree without the assent of the Chapter, that in that case the Deane and the Chapter may afterwards disagree to the remainder, and that the act of the Deane with-

out the assent of the Chapter shall not charge the Chap. in that behalfe. And thus it appeareth, though the meaning of the said chap. & article in the said sum be, that a Prelate may not disagree unto a legacy, for hurting of a house, yet he may after the lawes of the Realm disagree thereto, where it should hurt his house. And if in a Præcipe quod reddat, there be but one tenant, be he spirituall or temporall, & he refuse by way of disclaimer, in such case where hee may disclaim by the Law, there the land shall vest in the demandant: & if there be 2. tenants, then it shall vest in his fellow, if he will take the whole tenancy upon him, or else it shall vest in the demandant. But if an Abbot or Layman refuse the taking of the profits, and shew a speciall cause why it should hurt him if hee do assent, and hee thereby discharged as is said before: in whom the land shall then vest it is more doubt, whereof I will no further speak at this time. And thus it appeareth by divers of the cases that be put in this Chapter, that he that is ignorant in the law of the Realm, shall lack the true judgment of conscience in many cases. For in many of these cases that may be done therein by the law, must also be observed in conscience, &c.

§ Whether a gift made under a condition be void if the soveraigne only breake the question.

Chap. 34.

In summa Rosella in the title Alienatio, the 12 article is asked this question, whether a gift

mode under a certain forme may bee avoided or revoked, because the Prelates or Soveraigne onely did breake the forme, and it is there answered, that it may not, for that the deed of the Prelate onely ought not to hurt the Church: and if those words (under a manner) be understood of a gift upon condition as they seeme to bee, then the said solution holdeth not in this Realme neither in law nor conscience. D. What is then the Law of England if a man feoffe an Abbot by deed indented, upon condition, that if the Abbot pay not the Feoffor a certaine summe of money at such a day, that then it shall be lawfull to the Feoffor to re-enter, and at that day the Abbot faileth of his payment, may the Feoffor lawfully re-enter and put out the Abbot?

S. Yea verily, for hee had no right to the land but by the gift of the Feoffor, and his gift was conditionall, and therefore if the condition bee broken, it is lawfull by the Law of England for the feoffor to re-enter, and to take his land again, & to hold it as in his first estate: by which re-entry after the Lawes of the Realm, he disposeth the first livery of seisin, and all the meane acts done betweene the first feoffement and the re-entry: and it forceth little in the Law, in whom the default bee that the condition was not performed; whether in the Abbot or in his covent, or in both, or in any other person whatsoever he bee, except it be in the Feoffor himselfe. And it is great diversity betweene a cleere gift made to an Abbot without condition, and where it is made with condition: for when it is made with-

on condition, the act of the Abbot onely shall not by the common Law disherit the house, but it be in very few cases: but yet upon divers statutes the sufferance of the Abbot onely may disherit the house, as by his ceasser, or by levying of a croste upon a house against the statute thereof made, in which case the house thereby shall leese the land, and some say that by the common law upon his disclaimer in avowrie, a writ of right of disclaimer lyeth, but if the gift be upon condition, it standeth neither with law nor conscience, that the Abbot should have any more perfect or sure estate then was given unto him: and therefore as the said estate was made to the house upon condition, so that estate may be avoided for not performing of the condition. And I thinke verily that this I have said is to be holden in this Realme, both in the Law and Conscience, and that the decrees of the Church to the contrary, bind not in this case. But if the lands be given to an Abbot, and to his Covent to the intent to finde a lampe, or to give certaine almes to poore men, though the intent be not in those cases fulfilled, yet the feoffor, nor his heire may not re-enter: for hee desired no re-entry by expresse words, no in the words, when he said to the intent to find a Lampe, or to give almes, &c. is implyed no re-entry, nor the feoffor, nor his heires shall have no remedy in such cases, unlesse it be within the case of the statute of Westmin. 2. that giveth the Cessavit de Cantaria.

§ Whether a covenant made upon a gift to the Church, that it shall not be aliened, be good.

Chap. 35.

IN the said summe, called Summa Rosella, the said title Alienatio, the 13. article, is asked this question, whether a covenant made upon a gift to the Church, that it shall not be aliened, be good. And the same question is moved again in the said Summa called Rosella, in the title Conditio the first article, and in summa Angelica in the title Donatio prima, the 51. & 52. articles, & the intent of the question there is, whether notwithstanding that the condition be good to some alienations, whether that yet it be good to restraine alienations for the redemption of them that be in captivity under the Infidels, or for the greater advantage of the house: and though the better opinion be there, that the condition may not be broken for redemption of them that be in captivity, yet it is in manera whole opinion that it may be sold for the greater advantage to the house: for it is said there that it may not be taken, but that the intent of the giver was so and therefore they call the condition that prohibiteth it to be sold, conditio turpis, that is to say, a vile condition, wherefore they regard it not: but verily as I take it, if a condition may restrain any manner of alienations then it shall as well restraine Alienation for the two causes before rehearsed, as for any other causes: and though one thinketh that the condition is good, & after

after the lawes of the Realme, that upon gifts to the Church restraineth alienations, yet I shall touch one reason that is made to the contrary, that is this: there is a cleer ground in the law, that if a feoffment bee made to a common person in fee, upon condition that the feoffee shall not alien to no man, that condition is void, because it is contrary to the estate of a fee simple, to bind him that hath the estate, that hee should not alien if he list: and some say that an Abbot that hath land to him and to his successors, hath as high and as perfect a fee simple as hath a Lay-man that hath land to him and to his heires, and therefore they say, that it is as well against the Law of the Realme to prohibit that the Abbot shall not alien, as it is to prohibit a Lay-man therof: and though it bee therein true as they say, as to the highnesse of the estate, yet me thinketh there is a great diversity betweene the cases concerning their alienations: for when lands be given in fee simple to a common person, the intent of the Law is that the feoffee shall have power to alien, and if he do alien, it is not against the intent of the Law, ne yet against the intent of the feoffor: but when lands be given to an Abbot and to his Successors, the intent of the law is, and also of the giver (as it is to presume) that it should remain in the house for ever: and therefore it is called Mortmain, that is to say, a dead hand, as who saith that it shall abide there alway as a thing dead to the house. And therefore as I suppose the Law will suffer that condition to be good, that is made to restraine that such Mort-

main should not be aliened, and that yet it may prohibite the same condition to be made upon a feoffement made in fee simple to a man and to his heires: for that is the most high, the most free and the most pure estate that is in the law. But the law suffereth such a condition to bee made upon a gift in taile, because the Statute prohibiteth that no alienation should bee made thereof. And then as the Law suffereth such a condition upon gift in Mortmaine, that is to say, that it shall not be aliened, to be good: then it judgeth the condition also according to the words, that is to say, if the condition bee generall that they shall alien to no man, as this case is, that it shall be taken generally according to the words, & it shal not be taken, that the intent of the giver was otherwise then he expressed in his gift: though percase if hee were alive himselfe, and the question were asked him whether hee would bee contented it should be aliened for the said two cases or not, hee would say yea, but when he is dead no man hath authority to interpret his gift otherwise then the law suffereth, nor otherwise the then words of the gift be And if the condition be speciall, that is to say, that the land shall not be aliened to such a man, or such a man, then the condition shall be taken according to the words, and then they may be aliened as for that condition to any other, but to them to whom it is expresly prohibited that the land should not bee aliened to. And if the lands in that case be alienated to one that is not excepted in the condition then he may alien the land to him that is first excepted

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without breaking of the condition, for conditions be taken ſtrictly in the law and without equity. And thus me thinketh that becauſe the ſaid condition is generall, and reſtraineth all alienations, that it may not alienes neither by the Law of the Realme, ne yet by conſcience, no more for the ſaid two cauſes, then it may for any other cauſe: and this caſe muſt of neceſſity be judged after the rules and grounds of the Law of the Realme, and after no other Law as me ſeemeth.

§ If the Patron preſent not within 6. months, who ſhall preſent.

Chap. 36.

IN this ſaid ſum called Summa Roſella, in the title Beneficium in principio, it is asked, If the Patron preſent not within ſix months, who ſhall preſente, and within what time the preſentment muſt be made: And it is anſwered there, that if the Patron preſent not within ſix months, that the Chapter ſhall have ſix months to preſent, and if the Chapter preſent not within ſix months, that then the Biſhop ſhall have other ſix months: and if he be negligent, then the Metropolitan ſhall have other ſix months, and if he preſent not, then the preſentment is devolt to the Patriark: And if the Metropolitan have no ſuperiour under the Pope, then the preſentment is devolt to the

Pope And so, as it is said there, the Archbishop shall supply the negligence of the Bishop, if he be not exempt, and if he be exempt, the presentment immediatly shall fall upon the Bishop, to the Pope. And as I suppose these diversities hold not in the lawes of the realm. D Then I pray thee shew me who shall present by the Lawes of the realm, if the Patron do not present within 6. months? Stu. Then for default of the Patron the Bishop shall present, unlesse the King be Patron, and if the Bishop present not within six months, then the Metropolitan shall present, whether the Bishop be exempt or not And if the Metropolitan present not within the time limited by the Law, then there be divers opinions who shall present, for some say the Pope shal present, as it is said before, and some say the King shall present.

D. What reason make they that say the King should present in that case? St. This is their reason, they say that the King is Patron paramount of all the benefices within the Realme. And they say farther, that the King and his progenitors Kings of England, without time of minde, have had authority to determine the right of Patronages in this Realme in their owne Courts, and are bound to see their Subjects have right in that behalfe within the Realme, and that in that case from him is no appeale: And then they say, that if the Pope in this case should present, that then the King should not only leese his patronage paramount, but also that he should not sometime be able to do right to his Subjects.

D. In

D. In what case were that? St. It is in this case: The law of the Realme is, that if a benefice fall void, then the Patron shall present within 6. moneths, and if he do not, that then the Ordinary shall present: but yet the Law is further in this case, that if the Patron present before the Ordinary put in his Clerke, that then the Patron of life shall enjoy his presentment, and so it is, though the time should fall after to the Metropolitan, or to the Pope, and if the presentment should fall to the Pope, then though the Archbishop abode still void, so that the Patron might of right present, yet the Patron should not know to whom he should present, unlesse he should goe to the Pope, and so he should faile of right within the Realme, and if percase he went to the Pope, and presented an able Clerke unto him; and yet this Clerke were refused and another put in at the collation of the Pope, or at the presentment of a stranger, yet the Patron could have no remedy for the wrong within the Realme, for the Incumbent might abide still out of the Realme. And therefore the Law will suffer no Title in this case to fall to the Pope. And they say, that for a like reason it is, that the Law of the realm will not allow an excommengement that is certified into the Kings Court under the Popes Bulls: For if the party offered sufficient amends, and yet could not obtaine his letters of absolution, the King should not know to whom to write for the letters of absolution, and the party could not have right, and that the law will in no wise

Wife ſuffer. Doct. The Patron in that caſe may preſent to the Ordinary as long as the Church is void, and if the Ordinary accept him not, the Patron may have his remedy againſt him within this Realm. But if the Pope will put in an Incumbent before the Patron preſent, it is reaſon that he hath the preſentment, as me ſeemeth, before the King. St. When the Ordinary hath ſurceſſed his time, he hath loſt his power as to that preſentment, ſpecially if the collation be devolt to the Pope. And alſo when the preſentment is in the Metropolitan he ſhall put in the Clerk himſelf, & not the Ordinary: and ſo there is no default in the Ordinary, though he preſent not the Clerk of the Patron, if his time be paſt, and ſo there lyeth no remedy againſt him for the Patron.

D. Though the Incumbent abide ſtill out of the Realm, yet may a Quare Impedit lye againſt him within the Realme: And if the Incumbent make default upon the diſtreſſe, and appear not to ſhew his title, then the Patron ſhall have a Writ to the Biſhop according to the ſtatute, and ſo he is not without remedy.

S. But in this caſe hee cannot be ſummoned, attached, nor diſtrained within the Realme.

D. He may be ſummoned by the Church, as the tenant may in a Writ of right of Advowſon.

St. There the Advowſon is in demand, and here the preſentment is onely in debate: and ſo hee cannot be ſummoned by the Church here no more then if it were in a Writ of Annuity, and there the common return is, quòd Clericus eſt beneficiatus, non habens laicum feod ubi poteſt ſum-

summoneri. And though he might be summoned in the Church, yet he might neither be attached nor distrained there, and so the Patron should be without remedy. D. And if he were without remedy, he should yet be in as good case as he should be if the King should present: for if the title should be given to the King, the Patron had lost his presentment clearly for the time, though the Church abide still voide. For I have heard say that in such presentments no time after the Law of the Realme runneth unto the King. S. That is true, but there the presentment should be taken from him by right and by the Law, and here it should bee taken from him against the Law, and there as the Law could not helpe him, and that the Law will not suffer. D. Yet me thinketh alway that the title of the Lawes in such cases is given by the Law of the Church, & not by the temporall law, and therefore it forceth but little what the temporall Law will in it, as mee seemeth. S. In such countries where the Pope hath power to determine the right of temporall things, I think it is as thou saist, but in this realm it is not so. And the right of presentment is a temporall thing and a temporall inheritance, & therefore I think it belongeth to the Kings Law to determine & also to make lawes who shall present after 6. months as well as before. so that the title of examination of ability or non-ability bee not thereby taken from the Ordinary. And in like wise it is of avoidance of benefices, that is to say, then it shall be judged by the Kings Lawes when a benefice shall be said void and when not,

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and not by the Law of the Church, as when a parson is made a Bishop, or accepteth another benefice without a Licence, or resigneth, or is deprived, in these cases the common Law saith, that the benefice is void, and so they should be, though a law were made by the Church to the contrary: and so if the Pope should have any title in this case to present, it should be by the Law of the Realme. And I have not seene nor heard that the Law of the Realme hath given any title to the Pope to determine any temporall thing that may be lawfully determined by the Kings Court D. It seemeth by that reason that thou hast made now, that thou preferrest the Kings authority in presentments before the Popes, and that me thinketh should not stand with the Law of God, sith the Pope is the Vicar generall under God. Stu. That I have said proveth not, that for the highest preferment in presentments here is to have authority to examine the ability of the Parson that is presented: for if the presentee be able, it sufficeth to the discharge of the Ordinary, by whomsoever he be presented, and that authority is not denyed by the Law of the Realme to belong alway to the spirituall jurisdiction; but my meaning is, that as to the right of presentments, and to determine who ought to present, and who not, and at what time, and when the Church shall be judged to be void, and when not, belong to the King and to his Lawes: for else it were a thing in vaine for him to hold plee of Advowsons, or to determine the right of patronage in his owne courts, and not to have authority to determine

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the right thereof, and those claimes seemeth not to be against the Law of God. And so me seemeth in this case the presentment is given the King. D. And if the King should have right to present, then might the Church happen to continue void for ever; for as we have said before, no time runneth to the King in such presentment. St. If any such case happen, if the King present not, then may the Ordinary set in a deputy to serve the cure, as he may do when negligente is in other Patrons that may present and do not: and also it cannot be thought that the K. which hath the rule and governance over the people, not onely of their bodies, but also of their soules, will hurt his conscience, and suffer a benefice continually to stand without a Cure, no more then he doth in Advowsons that be of his owne presentment.

§ Whether the presentment and collation of benefices and dignities, voiding at Rome, belongeth onely to the Pope.

Chap. 37.

IN the same sum called Summa Roselle, in the title Beneficium primum, in the 13. article. It is said that benefices, dignities, and personages, voiding in the court of Rome, may not be given but by the Pope: and likewise of the Popes servants, and of other that come and goe from the Court, if they dye in places nigh to the Court within two dayes journey, all these belong to the Pope: but if the Pope present not within

in a month, then after the month they to whom it belongeth to present, may present by themselves onely, or by their vicar generall if they be in far parts. and these sayings hold not in the Law of the Realme Do. What is the cause that they hold not in this Realme, as well as in all other Realms? S. One cause is this: The King in this Realm according to the ancient right of his Crowne, of all his advowsons that be of his Patronage ought to present. And in like wise other Patrons of benefices of their presentment, and the pleas of the right of presentments of benefices within this Realme, belong to the King and his Crown. And these titles cannot bee taken from the King and his Subjects, but by their assent, and the law that is made therein to put away the title, bindeth not in this Realme. And over that before the statute of 25. E. 3. there was a great inconvenience and mischiefe, by reason of divers provisions and reservations that the Pope made to the benefices of this Realme; contrary to the old right of the King and other Patrons of this Realme, as well to the Archbishoprickes, Bishoprickes, Deanries and Abbies, as to other dignities and benefices of of the Church: And many times aliens thereby had benefices within the Realme, that understood not the English tongue, so that they could not counsell ne comfort the people, when need required, and by that occasion great riches were conveyed out of the Realme: wherefore to avoid such inconvenience, it was ordained by the said statute that all Patrons as well spirituall as temporall should have the presentments

ments freely: and in case the collation or provision were made by the Pope in disturbance of any Spirituall Patron, that then for that time the King should have the presentment, and if it were in disturbance of any lay Patron, that then if the Patron presented not within the half year after such voidance, nor the Bishop of the place within a month after the halfe yeare: that then the King should have also the presentment, and that the King should have the profits of the benefices so occupied by provision, except Abbies and Priories, & other houses that have colledge and covent, & there the colledge & covent to have the profits: and because the statute is general, and excepteth no such benefices as shall void in the Court of Rome, or in such other place as before appeareth, therefore they be taken to be within the provision of the said statute aswell as the benefices that void within the Realme: and all provisors & executors of the said collations & provisions: & all their attornies, notaries, & maintainers, shall be out of the protection of the K. & shal have like punishment as they should have for executing of benefices voiding within the Realm. D But I cannot see how the said statute may stand with conscience, that so farre restrained the Pope of his liberty, which as me seemeth hee ought in this case of right to have. S. Because (as I suppose) that Patrons ought of right to have their presentments, under such manner as they claime them in this Realm, as I have said before, and as in the 26. Chapter of this booke appeareth more at large: And also forasmuch as it appeareth evidently, that

that great inconvenience followed upon the said provisions, and that the said statute was made to avoid the same, which sith that time hath been suffered by the Pope, and hath been alway used in this realm without resistance, that the said statute should therefore stand with good conscience.

§ If a house by chance fall upon a horse that is borrowed who shall beare the losse?

Chap 38.

IN the said summe called Summa Rosella, in the title Casus fortuitus, in the beginning is put this case. If a man lend another a horse, which is called there Depositum, and a house by chance falleth upon the horse, whether in that case he shall answer for the horse? And it is answered there, that if the house were like to fall, that then it cannot be taken as a chance but as the default of him that had the horse delivered to him: But if the house were strong, and of likelyhood and by common presumption in no danger of falling, but that it fell by suddaine tempest, or such other casualty, that then it shall be taken as a chance, and he that had the keeping of the horse shall be discharged: though this diversity agreeth with the Lawes of the Realme, yet for the more plainer declaration thereof, and for the more like cases and chances that may happen to goods, that a man hath

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in his kæping that be not his owne, I shall adde a litle more thereto, that shall be somwhat necessary as mee thinketh to the ordering of conscience. First a man may have of another by way of lone, or borrowing money, corne, wine, and such other things, where the same thing cannot be delivered if it be occupied, but another thing of like nature and like value must be delivered for it. & such things he that they be lent to, may by force of the lone use as his owne. And therfore of they perish, it is at his jeopardy, & this is most properly called a Lone. Also a man may lend to another a horse, a ore, a cart, or such other things that may be delivered againe, and they by force of that lone may be used, and occupied reasonably in such manner as they were borrowed for, or as it was agreed in the time of the lone that they should be occupied, and if such things be occupied otherwise then according to the intent of the lone and in that occupation they perish, in what wise soever they perish, so it be not in default of the owner, he that borrowed them shalbe charged therewith in Law & conscience: and if he that borrowed them occupy them in such manner as they were lent for, & in that occupation they perish in default of him that they were lent to, then he shall answer for them, and if they perish not through his default, then he that oweth them shall bear the losse. Also if a man have goods to kæp to a certain day, for a certaine recompence for the kæping, how shall stand charged or not charged, after as default or not default shall be in him as before appeareth, and so it is if hee have nothing

for the keeping, but if not have for the keeping, & makes a promise for the time of the delivery to receive them safe at his perill, then he shall be charged with all chances that may fall. But if he make that promise & have nothing for keeping, I think he is bound to no such casualties, but that he will is his owne default, for that is a nude, or a naked promise, whereupon as I suppose no action lyeth. And if a man find goods of another, if they be after hurt or lost by wilfull negligence, he shall be charged to the owner, but if they be lost by other casualty, as if they be layed in a house that by chance is burned, or if he deliver them to another to keep that runneth away with them, I thinke he be discharged: and these diversities hold most commonly upon pleasures, or where a man hireth goods or his neighbor to a certain day for certain money: and many other diversities bee in the Law of the Realme. What shall be to the jeopardy of the one, & what of the other, which I will not speake of at this time: And by it may appeare that it is commonly holden in the lawes of England if a common carrier goe by the wayes that be dangerous for robbing, or have by night, or in other inconvenient time, and be robbed or if he overcharge a horse, whereby he falleth into the water, or otherwise, so that the horse is hurt or impaired: that he shall stand charged for his misdemeanors, and if he should percase refuse to carry it, unless promise were made unto him that he shall not be charged for no misdemeanour that should be in him, the promise were void: For it were against reason & against good manners,

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and so it is in all other cases like. And all these inheritances be granted by seuerall conclusions vpon the Law of reason, without any Statute made in that behalfe. And peraduenture this Law, and the conclusions therein, be the more plain and the more open. For if any Statute were made therein, I think verily moe doubts & questions would rise upon the Statute, then doth now when they be onely argued & iudged after the common law.

§ If a Priest haue won much goods by saying of Masse, whether he may giue those goods or make a will of them.

Chap. 39.

IN the said Summe called Summa Rosella in the title Clericus quatenus the thirde article, is asked this question: If a Priest haue won much goods by saying of masse, whether he may giue those goods, or make a will of them? whereto it is answered there, that he may giue them, or make a will of them especially when a man bequeathe money for to haue Masses said for him: by the like Law is of such things as a Clerk wineth by the reason of an office: for it is said there, that such things came to him by reason of his own person which sayings I think accord with the law of the realm. But forasmuch as in the said article and in diuers other places of the said chapter, and in diuers other chapters of the said summe, is put great diuersity betweene such goods, as a Clerk hath by reason of his

Church and such goods as he hath by reason of his person, and that he must dispose such goods as he hath by reason of his Church in such manner as is appointed by the law of the Church, so that he may not dispose them so liberally, as he may the goods that come by reason of his own person, therefore I shall a little touch what spiritual men may do with their goods after the law of the realm.

First a Bishop, of such goods as hee hath with the Dean and Chapter, hee may neither make gift nor bequest, but of such goods as he hath of his owne by reason of his Church, or of the gift of his ancestors or of any other, or of his patrimony, he may both make gifts and bequests lawfully. And an Abbot of the goods of his Church may make a gift, and that gift is good as to the Law: But what it is in conscience, that is after the cause and intent and quality of the gift; for if it be so much that it notably hurteth the house or the covent, or if he give away the books, or the chalices, or such other things as belong to the service of God, he offendeth in conscience, and yet he is not punishable in the Law, ne yet by Subpœna after some men, ne in none otherwise but by the Law of the Church as a waster of the goods of his monastery. But nevertheless I will not fully hold that opinion, as to that that belongeth necessarily to the service of God, whether any remedy lye against him or not, but remit it to the judgement of other. And of a Deane and Chapter, and a Master of brethren of goods that they have to themselves, and also of goods that they have with

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the Chapter and brethen, the same diversity holdeth, as appeareth before of a Bishop and the Dean and Chapter, except that in a case of a Maister & brethren the goods shall be ordered as shall be assigned by the foundation. And moreover of a Parson of a Church, Vicar and Chantry Priest, or such other, all such goods as they have, aswell such as they have by reason of the Parsonage, Vicarage, or Chantry, as that they have by reason of their owne person, they may lawfully give and bequeath where they will after the common law: And if they dispose part among the parishioners, and part to the building of Churches, or give part to the Ordinary, or to poore men, or in such other manner, as it is appointed by the Law of the Church, they offend not therin, unlesse they think themselves bounden thereto by duty, and by authority of the law of the Church, not regarding the Kings Lawes; for if they do so, it seemeth they resist the Ordinances of God, which hath given power to princes to make lawes: but there as the Pope hath soveraignty in tempozal things, as he hath in spirituall things there some say that the goods of Priests must in conscience be disposed as is contained in the said summe, but that holdeth not in this Realme: for the goods of spirituall men be tempozall in what manner soever they come to them, and must be ordered after the tempozall law as the goods of the tempozall man must be. Howbeit if there were a statute made in this case of like effect in many points, as the law of the Church is, I think it were a right good and a profitable statute.

§ Who shall succeed a Clerk that dyeth intestate.

Chap. 42.

IN the said sum called Rosella in the Chapter Clericus quartus the 7. Article, is asked this question, who shall succeed to a Clerke that dyeth intestat: and it is answered, that in goods gotten by reason of the Church, the Church shall succeed. But in other goods his kinsmen shall succeed after the order of the law, & if there be no kinsman, then the Church shall succeed. And it is said further, that goods gotten by a Canon secular by reason of his Church or prebend shall not go to his successor in the prebend, but to the Chapter. But where one that is benefited is not of the congregation, but he hath a benefice clerely separate, as if he be a Parson of a parish Church, or is a President or an Archdeacon not benefited by the Chapter, then the goods gotten by reason of his benefice, shall go to his successor, and not to the Chapter and none of these sayings hold place in the Laws of England D. What is then the Law of a Parson of a Church, or a Vicar in the Countrey dye intestate, or if a Canon secular bee also a Parson and have goods by reason thereof, and also by a Prebend that he hath in a Cathedrall Church, & he dye intestate, who shall have his goods? S. At the common Law the Ordinary in all these cases may administer the goods, and after he must commit Administration to the next

next faithfull friends of him that is dead intestate that will desire it, as he is bound to doe where lay-men that have goods die intestate. And if no man desire to have administration, then the Ordinary may administer, and see the debts payed, and he must beware that he pay the debts in such order as is appointed in the common Law: for if he pay debts upon simple contracts before an Obligation, he shall be compelled to pay the debt upon the Obligation of his owne goods, if there be no goods sufficient of him that died intestate, and though it be suffered in such case that the Ordinary may pay round and round like, that is to appoint the goods among the debtors after his discretion, yet by the rights of the common Law, he might be charged to him that can first have his judgement against him. And furthermore by that is said before in the last Chapter it appeareth that if a Bishop that hath goods of his patrimony, or a Master of a College, or a Dean of goods that they have of their own onely to themselves dye intestate, that the Ordinary shall commit administration thereof, as before appeareth, and if they make Executors, then the executors shall have the ministration thereof: But the heires nor the kinsmen by that reason onely that they be heires or of kin to him that is deceased, shall have no medling with his goods, except it be by customs of some countries where the heires shall have their lones, or where the children (the debts and legacies paid) shall have a reasonable part of the goods after the customs of the country.

§ If a man be outlawed of felony, or be attainted for murder or felony, or that is an Asciſmus, may be ſlain by every ſtranger.

Chap. 41.

IT appeareth in this ſaid ſum called Summa Angelica in the 21. Chap. in the title of Aſciſmus the 2. Paragrafe, that he is an Aſciſmus, that will ſlay men for mony at the inſtance of every man that will move him to it, and ſuch a man may lawfully be ſlain, not only by the Judge, but by every private perſon. But it is ſaid there in the 4 paragrafe, that he muſt firſt be judged by the law as an Aſciſmus ere he may be ſlain, or his goods ſeiſed. And it is ſaid further there in the 2. paragrafe, that alſo in conſcience ſuch an Aſciſmus may be ſlain if it be done through a zeal of juſtice, and elſe not. Is not the Law of the realm likewiſe of men outlawed, abjured or judged for felony?

St. In the law of the realme there is no ſuch Law that a man ſhall be judged as an Aſciſmus, ne if a man bee in full purpoſe for a certain ſumme of money that hee hath received, to ſlay a man, yet it is no felony, ne murder in the law till he hath done the act: for intent of felony nor murder is not puniſhable by the common Law of the Realme, though it be deadly ſinne before God, but in Treaſon or in ſome other particular caſes by ſtatute that intent may be puniſhed. And though a man in ſuch a caſe, kill a man for money: yet he ſhall not bee admitted that he

ber is an Aſciſmus. For as it is ſaid before, there is no ſuch terme of Aſciſmus in the Law of the realme, but he ſhall in ſuch caſe be arraigned upon the murther. And if he confeſſe it or plead that he is not guilty, and is found guilty by xii. men, he ſhall have judgement of life, and of member, and ſhall forfeit his lands and goods. And like law is of an Appeale brought of the murder, if hee ſtand dumbe and will not anſwer to the murder, he ſhall be attainted of the murder, and ſhall forfeit life, lands, and goods. But if he be arraigned of the murder upon an Indictment at the Kings ſuit, and thereupon ſtandeth dumbe and will not anſwer, there he ſhall not be attainted of the murther, but he ſhall have paine fort and dure, that is to ſay, he ſhall be preſſed to death, and he ſhall there forfeit his goods, and not his lands. But in none of theſe caſes (that is to ſay) though a man be outlawed for murder or felony, or be abjured, or that he be otherwiſe attainted: yet it is not lawfull for any man to murther him or ſlay him, ne to put him in execution but by authority of the Kings lawes. Inſomuch that if a man be adjudged to have paine fort and dure, and the Officer beheadeth him, or on the contrariwiſe putteth him to paine fort and dure, where he ſhould behead him, he offendeth the law. And if an Officer which hath authority to put a man to death, may not put him to death but according to the judgement, then me thinketh it ſhould follow more ſtronger that a ſtranger may not put ſuch a man to death of his owne authority without commandement

of

of the Law. But if the judgement be that he shall be hanged in chaines, and the officer hangeth him in other things and not in chaines, I suppose he is not guilty of his death: But some say he shall there make a fine to the King, because he hath not followed the words of the judgement.

Also if a man that is no officer would arrest a man that is outlawed, abjured, or attainted of murder or felony, as is aforesaid, and he disobeyeth the arrest, and by reason of the disobedience he is slaine, I suppose the other shall not be impeached for his death: for it is lawfull unto every man to take such persons & bring them forth that they may be ordered according to the law. But if a Capias be directed unto the Sheriffe to take a man in an action of debt or trespasse, there no man may take the man, but he have authority from the Sheriffe: and if any man attempt of his owne authority to take him and he resisteth, & in the resisting is slain, he that would have taken him is guilty of his death.

§ Whether a man shall be bounden by the act or offence of his servant or officer.

Chap. 42.

IN the said summe called Summa Angelica, in the title Dominus, titj. Paragrafe, is asked this question, whether a man shall be charged for his household: and it is said there that he shall when the household offendeth in an office or ministry

nistery that the Master is the chiefe officer of, and he hath the work and the profit of the houshold: For it shall be his default that he would chuse such servants, for hee ought to appoint honest persons: But it is said there, that it is to be understood civily & not criminally, whereby, as is said there, he that is a governour is bound for the offence of his officers and that the same is to be holden of a Captaine, that hee shall be bound for the offence of his squires, and an host for his guest, and such other. Neverthelesse it is said there, that certaine Doctors, there rehearsed, said thereto, that if the office be an open or publicke office, as an office of power, or other like, it sufficeth to bring forth him that offended: But it is otherwise if it be not a publike office, but an Host or a Taverner, or other like. But if the houshold offend not in the office the Lord is not bound as to the Law, but in conscience he is bound if he were in default by not correcting them, for he is bound to correct them both by word and example, and if he find any incorigible, he is bound to put him away except that he have presumptions, that if hee doe so, he will be the worse, and then he may doe that he thinketh best as he is excused, and else not: For to such persons it is said, Error qui non resistitur, approbatur: (that is to say) an Error that is not resisted, is approved. And though divers of the sayings before rehearsed agree with the Law of the Realme, yet all doe not so, and also they that do are to be observed by authority of the Law of the realm and not by the authority alledged in the said Paragrafe,

And

And therefore I intend to treat somewhat where the Master shall be charged for his servant, or deputy, or by them that be under him in any office, and where not, and then I intend to touch some other things. Where the Master after the Lawes of the realme shall be charged by the act of his servant in other cases not concerning offices, and where not.

First if a man bee committed to ward upon arrerages of accompt, and the keeper of the prison suffereth him to goe at large, then an action of debt shall lye against him. And if he bee not sufficient, then it lyeth against him that committed the keeping of the prison unto him, and that is by reason of the statute of West. the 2. cap. 11. Also if Bailiffs of Franchises that have Returne of Writs make a false returne, the party shall have a derrement against it, aswell of too little issues as of other things, aswell as he shall have against the Sheriffe, but all the punishment shall be only upon the bailiffe, & not upon the Lord of the Franchise, and that doth appeare by the statute made in the first yeare of King Ed. 3. the first chapter. But if an undersheriffe make a returne wherupon the Sheriffe shall be amerced, there the High Sheriffe shall be amerced, for the returne is made expressly in his name. But if it be a false returne wherupon an action of deceit lyeth, in that case it may bee brought against the undersheriffe. And see thereof a statute that is called Statutum de male returnantibus brevia.

Also if the Kings Butler make deputies he shall answer for his deputies as for himselfe,

as

as appeareth in the ſtatute made in the 21. yeere of King Edward the 3. De poſitionibus the 21. Chapter.

Alſo, in the ſtatute that is called Statutum Scaccarii, it is enacted among other things, that no officer of the Exchequer ſhall put any Clerk under him, but ſuch as he will anſwer for. And foraſmuch the ſtatute is generall, it ſeemeth that he ſhall anſwer as well for an untruth in any ſuch clerk as for an overſight.

Alſo in the 14 yeare of King E. the 3. ca. 9. it is enacted, that all gaolers ſhall be appointed again to the Sheriffe, and that the Sheriffe ſhall have the keeping of them, and that the Sheriffe ſhall make ſuch undergardeins for the which they will anſwer. And nevertheleſs I ſuppoſe that if there be an eſcape by the default of the Jailer that the King may charge the Jayler if he will. But it is no doubt but he may charge the Sheriff by reaſon of this ſtatute if he will. But if it be a wilfull eſcape in the Jayler which is felony in him, the Sheriffe ſhall not be bound to anſwer to the felony, ne none other but the Jayler himſelf, and they that aſſented to him.

Alſo if a man have a Sheriffwicke, Conſtableſhip, or Bailiwicke in fee, whereby he hath the keeping of priſoners, if he let any to repleavin that be not repleviſhable, and thereof be attaint, he ſhall leeſe the office, &c. And if it be an Undersheriffe, Conſtable, or Bayliff, that hath the keeping of the Priſon, that doth it without knowledge of the Lord, he ſhall have impriſonment by three yeares, and after ſhall be ranſomed at the Kings will, as appeareth

in

in the Statute of Weſt. the 1. the 17 chap. And ſo it appeareth, that in this caſe, he that is the Lord of the priſon, is not bound to anſwer for the offence of them that have the rule of the priſon under him, but that they ſhall have the puniſhment themſelves for their miſdemeanour. Alſo there is a ſtatute made in the 27. yeare of King Ed. 3. the 19. Chap. that is called the Statute of the Staple, whereby it is ordained, that no Merchant, ne none other man ſhall not loſe their goods for the Treſpaſs, or forfeit of their ſervants, unleſſe it be by commandement of his Maſter, or that he offend in the office that his Maſter hath put him in, or elſe that the Maſter ſhall be bound to anſwer for the deed of his ſervant by the law Merchant, as in ſome place it is uſed.

Alſo, it is enacted in the 14. yeare of King Edward the 3. the 8. Chapter, that the Wapentakes and Hundreds that be ſevered from the Counties ſhall be adjoined againe unto them, and that if the Sheriffe hold them in his owne hands, that he ſhall put in them ſuch Bailiffes that have lands ſufficient, and thoſe for whom hee will anſwer, and that if hee let them to ferme, that they be lent to the ancient ferme: but after it is prohibited by the ſtatute of the 22. yeare of King Henry the 6. the 10. Chap. That no Sheriffe ſhall let his Bailiwicks, nor Wapentakes to ferme. And when they be once in the Sheriffes owne hands, and the Sheriffe put in Bailiffes, they be but as under bailiffes to the King, and the Sheriffe the high bailiffe, & they in manner the Sheriffs ſervants & put in

only

onely by him: And therefore by the said Stat. of King Ed. the 3. he shall answer for them, if they offend in their office, but if the Sheriffe let them to ferme, then though the Sheriffe offend the Stat. in that doing, yet whether he shall be charged for their misdemeanor in the office or not, is a great doubt in some men, for they say that this Statute is onely to be understood where the bailiwicks be in the Sheriffs hands, but here they be not so, no the bailiffs bee not his servants, but his fermours: And therefore they say that if the Sheriffe shall be charged for them, it is by the common Law, and not by the Statute aforesaid. Also in the 2. yeare of K. Henry the first the 14. Chap. it is enacted, that Officers by patent in every Court of the King, that by vertue of their Office have power to make clerkes in the said Courts shall be charged and sworne to make such clerks under them, for whom they will answer. Also the Hospitelers and Templers be prohibit they shall hold no plee that belongs to the Kings Courts, upon paine to yeeld damages to the party grieved & to make ransome to the King: that the superiours shall answer for their obedience, as for their owne deed West. 2 chap 43: Also the Serjeant of the Catery shall satisfie all the debt, damages, and executions that shall be recovered against any that is purveior, or achator, under him that offend against the Statute of xxvi. of Ed. the iii or against the Statute of xxiii. of Henry the vi. in case the purveiour, or achatour bee not sufficient, &c. And the party plaintife shall have a Scire facias against the said ser-

ſergeant in this caſe to haue execution, as appeareth in the 14. yeare of King Henry the vi. the 1. chapter.

Alſo if a man bee ſent to priſon upon a Statute merchant by the Maior, before whom the recognisance was taken, and the Gaoler will not receiue him, hee ſhall anſwer for the debt if hee haue wherewith, and if not, then he ſhall anſwer that committeth the Gaole to him, as appeareth in the Statute called the ſtatute merchant.

And if outragious tolle bee taken in the towne Merchant, if it be the Kings towne in to farme, the King ſhall take the franchiſe of the Market into his handes: And if it be done by the Lord of the Towne, the King ſhall doe in like wiſe: And if it be done by the bailiffe, unknowing to the Lord, he ſhall yeeld againe as much as he hath taken, and ſhall haue impriſonment of 40. dayes: And ſo it appeareth that the Lord in this caſe ſhall not anſwer for his Bailiffe, Weſt. the 1. chapter 30. And in all the caſes before rehearſed, where the ſuperiour is charged by the default of him that is under him, he in whoſe default his ſuperiour is ſo charged, is bound in conſcience to reſtore him that is ſo charged through his default: except the caſe before rehearſed of the Hoſpitlers, for all that the obedienter hath, is the ſuperiours if he will take it And therefore what recompence ſhall be made by the obedienter in that caſe is all at the will of the ſuperiour And now I intend to ſhew thee ſome particular caſes, where the maſter after the lawes of the realm ſhall be charged by the act of his ſeruant, bailiffe, or deputy

where

where not, and so for to make an end of this Chapter.

First for trespasse of battery, or wrongful entrie into lands or tenements, he yet for felony or murder, the master shall not be charged by his servant, unlesse he did it by his commandement.

Also if a servant borrow money in his Masters name, the Master shall not be charged with it, unlesse it come to his use, and that by his assent. And the same law is if a servant make a contract in his masters name, the contract shall not bind his master, unlesse it were by his masters commandement, or that it came to the Masters use by his assent. But if a man send his servant to a fayre or market to buy for him certaine things, though he command him not to buy them of no man in certaine, and the servant doth accordingly, the Master shall be charged, but if the servant in that case buy them in his owne name, not speaking of his Master, the Master shall not be charged, unlesse the things bought come to his use.

Also if a man send his servant to the market to buy a thing which he ought to deliver to be sold to a certaine man, and he selleth it to him, there an action lyeth against the master: but if the Master did bid him not sell it to any person in certaine, but generally to whom he can, and he selleth it accordingly, there lyeth no action of deceit against the Master.

Also if the servant keepe the Masters fire negligently whereby his Masters house is burnt and his neighbours also, there an action lyeth

against the Master. But if the servant bouts fire negligently in the street, and thereby the house of another is burned, there lyeth no action against the Master.

Also, if a man desire to lodge with one, that is no common Hosteler, and one that is servant to him that he lodgeth with, robbeth him chamber, his master shall not be charged for the robbing: but if he had been a common Hosteler he should have been charged.

Also, if a man be a gardein of a prison, wherein is a man that is condemned in a certain summe of money, and another that is in prison for Felony, and a servant of the gardein that hath the rule of the prison under him. wilfully letteth them both escape: in this case the gardein shall answer for the debt, and shall pay a fine for the escape of the other, as for a negligent escape, and the servant onely shall be put to answer to the felony, for the wilfull escape.

Also, if a man make another his generall receivour, and that receivour receiveth money of a creditour of his Master, and maketh him acquittance, and after payeth not his Master, yet that payment discharged the creditour: but if the creditour had taken an acquittance of him without paying him his money, that acquittance onely were no barre to the Master, unlesse he made him receivour by writing, and gave him authority to make acquittances, and then the authority must be shewed. And if the creditour in such case by agreement between the receivour and him, delivered to the rec-

receiuour a horse or another thing in recompence of the debt, that delivery dischargeth not the creditour, unlesse it be delivered over unto the Master, and he agree to it. For the receiuour hath no such power to make no such commutation, but his master give him speciall commandement thereto.

Also, if a servant shew a creditour of his master, that his master sent him for his money, and he payeth it unto him, that payment dischargeth him not, if the master did not send him for it indeed, except that it came after unto the use of the master by his assent.

Also, if a man make a bayliffe of a manor, and after the Lord of whom the manor is holden grant the seigniorie to another, and the bailiffe after payeth the rent to the grantee, that payment of the rent counterbaileth no attournement though it were by fine; he shall not bind his Master, till he attorne himselfe: but if the Lord of whom the Land is holden disseised one of the seigniorie, and the bailiffe payeth the rent to the heire of the Lord, that is a good seisin to the heire, though the bailiffe had no commandement of his Master to pay it: For it belongeth to his office to pay rents service, but not rent charge as some men say.

Also, an encrochment by the bailiffe shall not bind the master in a vowry, if he had no commandement of the master to pay it. Also, if there be Lord, mesne, and tenant, and the tenant holdeth of the mesne as of his manor of D. the mesne maketh a bailiffe, and after the tenant maketh a feoffement, the feoffee tendeth notice to the bailiff.

and he accepteth his rent with the arrerages, this notice shall not bind the Lord, ne compell him to alter his avowry: for the office of a bailiffe stretcheth not thereto, but he must have therein a speciall commandement of his Master. Also if a servant ride on his masters horse to doe a errand for his Master into a Towne that hath authority to make attachments of goods upon plaints of debt, &c. and thereupon a plaint of debt made against the servant, the Masters horse is attached by the Officers, thinking that the horse was his owne, and because the servant appeareth not the officers seise the horse as forfeit: in this case the Lord shall have an action of trespass against the officers, & this attatchment for the debt of his servant, shal not bind him, &c. But that an host or keeper of a Taverne shall be charged for their guests, unlesse it be done by their assent and commandment I doe not remember that I have read it in the laws of England.

§ Whether a villain, or a bondman may give away his goods.

Chap. 43.

IT appeareth in the said summe, called Summa Angelica, in the title Donatio prima the 9. Paragrafe, that a bond man, or a religious man, a Monke, ne such other that hath nothing in proper, may not give but it be by licence of their Superiour but that saying is not, as it is said

said there, to be understood of Religious persons that have lawfull ministration of goods, for they give with a cause reasonable, it is good, but without cause they may not.

Also if they by the licence of the prelate with the counsell of the more part of the Covent abide at schoole or goe on pilgrimage, they may give as other honest scholers and pilgrims, her reasonably wont to doe: and they may also give almes where there is great need, if they have no time to aske licence.

Also if they see one in extreme necessity they may give almes though their superiours prohibite them, for then all things bee in common by the law of God. And therefore they be bound for to doe it, as appeareth in the aforesaid sum called Summa Angelica in the title Eleemosina, the 6 Paragrafe. Doth not the law of England agree with these diversities? Sir. Forasmuch as the question is onely made whether a Villaine or a Bondman may give away his goods or not: and it seemeth that after the aforesaid Sum, in the title which thou hast before rehearsed, that he, ne none other that hath no property may not give, whereby it appeareth that the said Summe taketh it, that a Bondman should have no property in his goods, and that therefore his gift should be void, I shall somewhat touch what property and what authority a Villaine hath in his goods after the Law of the Realme, and what authority the Lord hath over them. And I will leave the diversities that thou hast remembred before of Religious persons to them that ill to treat

further therein hereafter.

First, if a Villaine have goods either by his owne proper buying and selling, or otherwise by the gift of other men, he hath as perfect a property, and also as whole interest in them, and may as lawfully give them away as any free man may. But if the Lord seise them before his gift, then they be the Lords, and the interest of the villain therein is determined.

Also if the Lord seise part of the goods of his Villaine in the name of all the goods that the Villaine hath or shall hereafter have, that seisure is good, for all the goods that he had at the time of the seisure. But if goods come to the Villaine after the seisure, he may lawfully give them away notwithstanding the said seisure.

Also if the Lord claime all the goods of the villaine, and seiseth no part of them, that seisure is void, and the gift of the villain is good notwithstanding that seisure

Also if a man be bound to a Villaine in an Obligation in a certain summe of money, and the Lord seiseth the Obligation, then the obligation is his, but yet he can take no action thereupon but in the name of the Villaine: and therefore if the Villain release the debt, the Lord is barred by that release.

Also if a woman be a nieke, and she marrieth a free man, the goods immediately by the marriage be the husbands, and the Lord shall come too late to make any seisure: and if the husband in that case maketh his wife his Executrix and

and dyeth, and the wife taketh the same goods again as Executrix to her husband, yet it shall not be lawfull for the Lord to take them from her, though she be a niefe as she was before the marriage.

Also if goods be given to a man to the use of a Villaine, and the Lord seiseth those goods, the seisure after-some men is good by the Statute made in the 19. yeare of K. H. 7 whereby it is enacted, that the Lord shall enter into lands whereof other persons be seised to the use of his villain: and they say that the same Statute shall be understood by equity of goods in use, aswell as of Lands in use.

Also if a Villaine be made a priest, yet nevertheless the Lord may seise his goods and lands as he might before: and untill the seisure he may alien them and give them away as he might before he was priest. And in this case the Lord may order him so, that he shall do him such service as belongeth to a Priest to doe, before any other: but he may not put him to no labor nor other businesse but that is honest and lawfull for a Priest to do.

Also if a villaine enter into religion in his yeare of proofe, he may dispose his goods as he might have done before he toke the habit upon him.

And in like wise the Lord may seise his goods as hee might have done before, but if hee after make executors, and be profited, and the executor take the goods to the performance of the will then the Lord may not seise the goods though the executors have them to the perfor-

mance of the will of him that is his vallaine nor in that case the Lord may not seise his body, ne put him to no manner of labour, but must suffer him to abide in his religion under the obedieme of his superior as other religious persons doe, that be not bounden: and the Lord hath no remedy in that case for losse of his boadman, but onely to take an action of Trespass against him that received him into religion without his licence, thereupon to recover damages, as shall bee assessed by xii. men. Many other cases there bee concerning the gift of the goods of a villaine, whereof I shall speak no more at this time, for this that I have said sufficeth to shew that the knowledge of the Kings Law is right expedient to the good order of conscience concerning such goods.

§ If a Clark be promoted to the title of his patrimony, and after selleth his patrimony and after falleth to poverty, whether shall he have his title therein or not.

Chap. 44.

IN the said summe called Rosella in the title Clericus quartus, the 24 article it is asked if a Clerke be promoted to the title of his patrimony, whether hee may aliene it at his pleasure, and whether in that alienation the solemnity needeth to be kept, that is to be kept in alienations

nations of things of the Church: and it is answered there, that it may not be alienedno more then the goods of the spirituall benefice, if it be accepted for a title, and expressely assigned unto him, so as it should goe as into a thing of the Church. except he have after another benefice whereof he may live But if it be secretly assigned to his Title, some agree it may be alienedand in this case by the lawes of the Realme, it may be lawfully alienedwhether it be secretly or openly assigned to the Title, for the Ordinary ne yet the party himselfe after the old custome of the Realme, have no authority to bind any inheritance by authority of the spirituall law: and therefore the land after it is assigned and accepted to be his title, standeth in the selfe same case to bee bought, sold, charged or put in execution, as it did before. And therefore it is somewhat to be marvelled that Ordinaries will admit such Land for a title, to the intent that he that is promoted should not fall into extreame poverty, or goe openly a begging, without knowing how the common law will serve therein: for of meere right all inheritances within the Realme ought to be ordered by the Kings lawes, and inheritances cannot be bound in this Realme, but by fine, or some other matter of record, or by feoffement or such other, or at least by a bargin that chargeth an use. And over that to assigne a state for terme of life to him that hath a fee simple before, is void in the lawes of England without it be by such a matter that it worke by way of conclusion or estoppell, and in this case is no

such

such matter of conclusion: and therefore all that is done in such case in assigning of the said title is void. Also there is no interest that a man hath in any Manor, Lands, or Tenements for terme of life, for terme of yeers, or otherwise, but that hee by the law of the realme may put away his right therein if he will. And then when this man alieneth his Land generally, it were against the law of the Realme that any interest of such a Title should remaine in him against his owne sale: and there is no diversity whether the assignment of the Title were open or secret, and so the Title is void to all intents. And in like wise if a house of Religion, or any other spirituall man that hath granted a Title after the custome used in such tities, sell all the lands and goods that they have, that sale in the laws of England is good as against the title, and the buyer shall never bee put to answer to the title. Also some say, that upon the common titles that be made daily in such case, that if he fall to poverty that hath the title he is without remedy: for they be so made that at the common Law there is no remedy for them, and if hee take a suit in the spirituall Court, many men say that a Prohibition or a Præmunire lyeth. And therefore it were good for Ordinaries in such case to counsell with them that be learned in the Law of the Realme to have such a forme devised for making of such titles, that if need bee, it would serve them that they be made unto, or else let them be promoted without any title, and to trust in God, that if they serve him as they ought to doe, he will provide for them

to

to have sufficient for them to live upon. And besides these cases that I have remembred before, there be many other cases put in the said sums for the well ordering of conscience, that as me thinketh are not to be observed in this Realm, neither in law nor conscience.

Do. Doest thou then thinke that there was default in them that drew the said summes and put therein such cases and such solutions that as thou thinkest hurt conscience, rather then to give any light to it, specially as in this Realme? S. I thinke no default in them, but I thinke that they were right well and charitably occupied, to take so great paine and labour as they did therein, for the wealth of the people and clearing of their conscience: for they have thereby given a right great light in conscience to all Countries where the Law Civill and the Law Canon be ried to temporall things. But as for the Lawes of this Realme they knew them not, ne they were not bound to know them: and if they had known them, it would little have holpen them for the countries that they most specially made their treatises for: And in this country they also be right necessary and much profitable to all men, for such doubts as rise in conscience in divers other manners not concerning the Law of the Realm. And I marvell greatly that none of them that in this Realme are most bounden to doe that in them is to keepe the people in a right judgement, and in a clearenesse of conscience, have done no more in times passed to have the Law of the Realme knowne then they have done, for

For though ignorance may sometimes excuse, yet the knowledge of the truth, and the true judgement is much better, and sometimes though ignorance excuseth in part, it excuseth not in all: and therefore me thinketh they did very well if they would yet be callers on to have that point reformed as shortly as they could. And now because thou hast well satisfied my mind in many of these questions that I have made, I purpose for this time to make an end. Do I pray thee yet shew me of that thou make an end more of these cases, that after thine opinion bee set in divers bookes of learning of conscience, that as thou thinkest for lack of knowledge of the Law of the Realme, doe rather blind consciences, then give a light unto it: for if it be so, then surely as thou hast said it would be reformed, for I think verily the lawes of the Realme in many cases must in this Realme be observed aswell in conscience, as in the judiciall Courts of the Realme S. I will with good will shew to thee shortly some other questions, that be made in the said Summe, to give thee another occasion, to see therein the opinions of the said Summes, and to see farther thereupon how the opinions and the lawes of the Realme doe agree together. And yet besides these questions that I intend to shew unto thee, there bee many other questions of the said summes, that had as great need to bee more plainely declared according to the Lawes of the Realme, as these that I shall shew thee hereafter, or as I have spoken of before: but to the cases that I shall speak of hereafter, I will shew thee nothing

thing of my conceit in them, but will leave it to other that will of charity take some further pain hereafter in that behalfe.

§ Divers questions taken out of the Student of the sums, called Summa Rosella, and Summa Angelica, which he thinketh necessary to be looked upon, and to be seene how they stand and agree with the Law of the Realme.

Chap. 45.

The first question is this, whether a Custome may breake a Law positive, Summa Rosella titulo Consuetudo para. 13.

The second is, if a man attainted or banished be restored by the Prince, whether shall that restitution stretch to the goods, Summa Rosella, in the title Damnatus in principio.

Item, if a man be outlawed of felony, abjured, or attainted of murder or felony, or he that is an Ascismus may be slain by strangers: and see like matter thereto, Summa Angel. in the title Ascismus para. 11.

This question is somewhat answered to, in a new addition, as appeareth before in the 14. Chapter.

Item, whether the master shal be bound by the act, or offence of his servant, or officer, Summa Angel.

Angel. in thet tle Dominus para.4

This question is answered to in an addition, as appeareth before the xlii. Chapter.

Item, whether a Villaine may give away his goods, Summa Angelica, in the title, Donatio prima, para.9.

This question is answered to in an addition, as appeareth before in the 43. Chap.

Item, whether an Abbot may give, et Summa Angelica, in the title Donatio 1. para.10. & 30,

Item, whether a woman covert may give away any goods And it is answered Summa Angelica, in the title Donatio 1. para.11 that she may not, without she have goods beside her dowrie, but only in almes.

Item, if a man do treason, whether his gift of goods after before attainder, be good Summa Angelica, in the title Donatio. 1. para.12 & it seemeth there may, and look Summa Angelica, in the title Alienatio, para.24.

Item, if a man wittingly make a contract between two kinsfolke, or other that may not lawfully marry together, whether he hath forfeit his goods Summa Angelica, in the title Donatio 1. para.14.

Item, whether the Father may give to the son, Summa Angelica in the title Donatio prima par.19. and Summa Rosella, in the title Donatio 2. para.42.

Item, whether a man may give above v C. a absque inquisitione Summa Angelica in the title Donatio 1. para.20.

Item, whether a gift shall be avoided by an in=

ingratitude, Summa Roſella, in the title, Donatio 1 para. 17. & 29. and there it is ſaid, that the gift is void by the law of nature, and look Summa Angelica, in the title Donatio prima, para. 42. & 45.

Item, where any gift betweene the husband and the wife may be good, and it is ſaid yea, when the husband giveth it. Cauſa remunerationis, Summa Roſella, in the title Donatio 1. para. 32.

Item, if a man make a will, & enter into religion, whether he may after revoke the will and it is ſaid, that Friers Minors may not, and others may Summa Roſella, in the title Donatio 1 para. 35. in fine.

Item, if a man give another a town with all the rights that he hath in the ſame, whether the patronage, &c. and the tithes paſſe, Summa Roſella in the title Eccleſia 1. para. 56.

Item, whether all that is bought with the money of the Church bee the Churches, Summa Roſella, in the title Eccleſia 1. para. 7.

Item if a gift made to a Monaſtery, may bee avoided by that the giver hath children after the gift. Summa Roſella in the title Donatio 1. para. 43.

Item, if a man buy a thing under the halfe price, whether he be bound by the Law to reſtore it. Summa Roſella in the title Emptio & vinditio, para 6.

Item whether a common theefe, vel communis depopulatur agrorum may abjure, Summa Roſella, in the title Emunitas 2. in principio. Et habetur

betur ibi in fine, quod licet leges excipiant plures personas tum per jus canonicum legibus derogatum est.

Item, whether a man shall take the Church for great enormitious offences that is not murder nor felony. Summa Rosella, in the title Emunitas 2 para. 3. 11.

Item, if a man take one in the high way and draw him out, & there beateth him, whether he shall have the punishment that is ordained for them that strike one in the highway, Summa Rosella in the title Emunitas 2 para. 6.

Item, whether he that taketh the Church may after the offence be judged to death, Summa Rosella, in the title Emunitas 2. para. 8.

Item, whether the Bishops palis is by sanctuary, Summa Rosella in the title Emunitas. f. 24

Item, whether a dignity of the Bishop, or Priesthood discharge bondage. Summa Rosella in the title Episcopus, in principio.

Item, whether a Clerk is bound to pay any Impositions, or Tollages, for his patrimony or otherwise Summa Rosella, in the title Excommunicatio 1. divisione oct. para. 4. & 5. & 6. & divisione nona, para. 1.

Item, if it were ordained by statute, that if a man sell, &c. he shall give to the King ii d. whether a clerk be bound to give it if he sell of his prebend Summa Rosella, in the title Excommunicatio, 1. divisione nona, para. 3

Item, if it be ordained by statute that there shall not be laid upon a dead person, but such a certaine cloath, or thus many tapers, or candels

dels whether the statute be good, & it is left for a question. Summa Rosella, in the title Excommunicatio 1. divisione 18. para. 8. in fine.

Item, if a man make a lease of a mill for term of yeers, & it is agreed that the lessee shall grind the lessor tolle free during the term, after the lessor is made Earle or a Duke, and hath greater houshold then before, whether the lessee be bound there &c. Summa Rosella, in the title Familia p. 8.

Item, if a master will not pay his servants wages that have served him faithfully, whether that servant may take secretly as much goods of the masters, &c. and if he do whether he be bound to restitution. Summa Rosella, in the title Familia para. 6.

Item, things immoveable of the Church may not be given, Summa Rosella, in the title Feodum para. 1. And see there in principio what Feodum is.

Item whether the sons bastards, and the sons lawfully begotten shall inherite together, Summa Rosella, in the title Filius para. 1.

Item, whether father and mother may succeed to their bastards. Summa Rosella, in the title Filius para. 4.

Item, whether the father may leave any of his goods to his bastards, Summa Rosella in the title Filius para. 5. And Summa Rosella in the title Societas, para. 22.

Item, whether the offence of the father shall hurt the son in temporall things, Summa Rosella in the title Filius.

Item, if a man giveth his lands and goods to his children, whether a bastard shall have any

part, Summa Roſella in the title filius para. 22.

Item, to whom treaſure found belongeth Summa Roſella in the title furtum, para. 11.

Item, if a deare, or other wild beaſt that is ſo ſore hurt that he may be taken, commeth into another mans ground whether it bee his that ſweth the ground, or his that ſtrake him, Summa Roſella in the title furtum para. 13.

Item, whether theft be in a little thing aſwel as in a great thing, Summa Roſella, in the title furtum para. 18.

Item, what paine a theefe ſhall have, Summa Roſella, in the title furtum para. 22.

Item, that if goods of dead men goe to the heires, & that of damned men, s. De terris. Summa Roſella, in the title Hæreditas, parag. 1.

Item, whether a man ſhall be ſaid guilty of murder by commandement, counſell, or aſſent, Summa Roſella, in the title Homicidium 2. per totum, and like matter is Homicidium 4. in principio, and in divers other caſes.

Item, a man maketh a privy contract with a woman, and after have a child by her, & after marieth another woman, and hath a child, ſhe not knowing the firſt contract, which of the children ſhall be his heire, Summa Roſella, in the title Illegitimus para. 4.

Item, whether the Pope may legitimate one to temporall things, and to ſucceed, Summa Roſella, in the title Illegitimus para.

Item, if goods be found that were left of the owner as forſaken, who hath right to them, Summa Roſella, in the title Inventa para. 2. And likewiſe Summa Roſella in the title furtum para. 17.

And

And thus I make an end of these questions: because thou desirest me in the 3. Chapter, to shew thee somewhat, where ignorance excuseth in the laws of the Realme, and where not, I will answer somewhat to thy question, and so commit thee to God.

Where ignorance of the Law excuseth in the Laws of England, and where not.

Chap. 46.

Ignorance of the law (though it be invincible) doth not excuse as to the law but in few cases: for every man is bound at his perill to take knowledge what the law of the realm is, aswell the law made by Statute as the common law, but ignorance of the deed, which may be called the ignorance of the truth of the deed may excuse in many cases. As if a case that a statute penall is made, and it is enacted that the statute shall be proclaimed by such a day in every shire, and it is not proclaimed before the day, and after the day a man offends against the statute, shall he runne in the penalty? I think yea: if there be no saving words in the statute to help him; that is to say, that if the proclamation be made, that no man shall be bound by the statute the cause is this, there is no Statute made in this Realm but by the assent of the Lords spirituall & temporal, & of all the commons, that is to say, by the knights of the shire, Citizens and Burgesses that be chosen by assent of the commons, which in the Parliament represent the estate of the whole commons:

And every statute there made, is of as strong effect in the law, as if all the commons were there present personally at the making thereof, and like as there needed no proclamation, if all were there present in their [illegible] person, so the law presumeth there needeth no proclamation, when it is made by there authority, & then when it is enacted, that it should be proclaimed, & that is but of the favours of the makers of the statute, & not of necessity, and it cannot therefore be taken, that their intent was that it should be void if it were not proclaimed. Nevertheless some be of opinion, that if it [illegible] before the day appointed for the proclamation offend the statute, that he should not in that case be punished, for they say that the intent of the makers of the statute shall be taken to be, that none should be punished before the day, which is a doubt to some other. But admit it be as they say that he shall be excused, yet it is not excused by the ignorance of the law, but because the intent of the makers excuseth him. It is enacted in the 7. year of R. 2. chap. [illegible] Sheriffs shall proclaime the statute of [illegible] every year, in every market town, to the intent the offenders shall not be excused by ignorance, & it seemeth by those words, that if no proclamation be made, that the offenders may be excused by ignorance. Stu. Some take the intent of that statute to be, that the people by that proclamation should have knowledge of the statute of Winchester, to the intent that the forfeiture therein may be taken as well in conscience as in law, and some take the statute to be

of

of such effect as thou speakest of, that is to say, that no forfeiture should grow upon the statute of Winchester against them that were ignorant, but proclamation were made according to the said statute of Richard. And if it be so taken, the statute of Winchester is of small effect against most part of the people, for certain it is that the said proclamation is not made: howbeit it hath as they say, that they that be ignorant be excused by the said particular statute, specially made in that case, and not by the general rules of the law: and sometime in divers statutes Penals, they that be ignorant bee excused by the said statute, as it is upon the statute of Richard the 2. the 13. yeare, the 2. statute, and the last Chapitre where it is enacted, that if any person take a benefice by provision that he shall be banished the realme and forfeit all his goods, and that if he be in the Realm, he avoid within 6. weekes after he hath accepted it, and that none shall receive him that is so banished after the said 6. weekes upon like forfeiture if he have knowledge: and so he that hath no knowledge is excused by the expresse words of the statute. And in like wise he that offendeth against Mag. Cha. is not excommunged, but hee have knowledge that it is prohibit that he doth. For they bee onely excommunged by the sentence called Sententia lata super cartas, that doe it wittingly, or that doe it by ignorance, and correct not themselves within 15. dayes after they have warning. And sometime they that be ignorant of a Statute, be excused from the penalty of the statute, because it shall be taken that the intent of the makers of the sta-

tute was that none should be bound but they that have knowledge: but that any man shall be discharged in the law by ignorance of the law onely for that he is ignorant, I now few cases except it might be applied to infants that be in their infancy, & within yeeres of discretion: for if ignorance of the law should excuse in the law, many offenders would pretend ignorance. Do. Shall an infant that hath discretion, & knoweth good from evill be punished by a penal stat. that he is ignorant in? S. if the statute be, that for the offence he should have corporall paine, I thinke he shall be excused and have no corporall paine: but I suppose that that is not for the ignorance. for though he knew the statute, & willingly offended, yet I thinke he shall have no corporall paine: As where he plead Joynt-tenancy by deed that is found against him, or if he plead a Record in Assise and faileth of it at his day: but that is because the law presumeth that it was not the intent of the makers of the Statute, that he should have that punishment: but if he be of yeeres of discretion to know good from evill, whether he shall then forfeit the penalty of a penall statute it is more doubt; for it is commonly holden, that if an infant had not been excepted in the statute of forejudgment, that the forejudgement should have bound him, and so shall his cessor and his levying of a crosse against the statute, or if he be a garden of a prison & suffer a prisoner to escape, he shall pay the debt, because the statutes be generall, and if he should by the statutes be bound within age, like reason will that he may by a stat. penal leese his goods. D.

If

Jean Infant doe a murder or felony at such yeares as he hath discretion to know the law, shall he not have the punishment of the Law as one of full age? S. I think yes but that is by an old Maxime of the law, for eschewing of murders & felonies, and so it is of a trespas: but these cases run not upon the ground of ignorance, but with what acts infants shall be punishable or not punishable, for their tendernesse of their age, though they be not ignorant. Do We not yet Knights and noblemen that are bound most properly to set their study to acts of chivalry, for defence of the realm. and husband men that must use tillage and husbandry for the substance of the commonalty, and that may not by reason of their labour put themselves to know the Law, discharged by ignorance of the law? S. Noverily, for sith all were makers of the statute, the Law presumeth that all be knowledge of that that they make, as it is said before: and as they bee bound at their perill to take knowledge of the statute that they make, so be all them that come after them And as for knights and other nobles of the Realme me seemeth that they should bee bound to take knowledge of the Law as well as any other within the Realme, except them that give themselves to the study and exercise of the law & except spirituall judges, that in many cases be bound to take knowledge of the Law of the realm as is said before in cha. 25. For though they be bound to acts of Chivalry, for the defence of the Realme yet they be bound also to the acts of Justice, that (it seemeth) more then other be by reason of their great possessions and

authority: and for the well ordering of the tenants servants, and neighbours that many times have need of their help, and also because they be oft called to be of the Kings counsell & to the generall counsels of the Realme, where their counsell is right expedient and necessary for the common wealth: and therefore if the noblemen of this Realme would see their children brought up in such manner, that they should have learning and knowledge, more then they have commonly used to have in time past, specially of the grounds & principles of the law of the Realm wherein they be inherit (though they had not the high conning of the whole body of the law, but after such manner as M. Fortescue in his book that he entitleth the Book de laudibus legum Angliæ advertiseth the Prince to have knowledge of the laws of this Realm) I suppose it would be a great helpe hereafter to the ministration of Justice of this Realm, a great surety for himself, and a right great gladnesse to all the people: for certain it is, the more part of the people would more gladly hear that their rulers and governors entended to order them with wisdome and justice, then with power and great retinues But ignorance of the deed many times excuseth in the Laws of England, and I shall shortly touch some cases thereof to shew where it shall excuse, and where it shall not excuse, and then the reader may add to it after his pleasure, and as he shall think to be convenient.

§ Certaine cases and grounds where ignorance of the deed excuseth in the laws of England, and where not.

Chap.

Chap. 47.

If a man buy a horse in open market of him that in right had no property to him, not knowing but that he hath right, he hath good title and right to the horse, and the ignorance shall excuse him. But if he had bought him out of the open Market, or if hee had knowne that the seller had no right, the buyer in open Market had not excused him. Also if a man retaine another mans servant not knowing that he is retained with him, the ignorance excuseth him both of the offence that was at the common law against the Maxime that prohibited such retaining of another mans servant, and also against the Statute 33. Ed 3. whereby it is prohibit upon paine of imprisonment, that none shall retaine no servant that departeth within his term, without licence or reasonable cause: for it hath been alway taken, that the intent of the makers of the said Statute was, that they that were ignorant of the first retainour, should not run in any penalty of the Statute. And the same Law is of him that retaineth one that is Ward to another, not knowing that he is his Ward. And if homage be due, and the Tenant after that the homage is due maketh a Feoffement, and after the Lord not knowing of the Feoffement distraineth for the homage, in that case that ignorance shall excuse him of his damages in a Replevin though he cannot avow for the homage: but if he had knowne of the feoffement, he should have yelded damages for the wrongfull taking. Also if a man be bound in an Obligation that he shall re-

repaire the houses of him that he is bound to by such a certaine time, as oft as need shall require, and after the houses have need to be repaired; but he that is bound knoweth it not, that ignorance shall not excuse him, for he hath bound himselfe to it and so he must take knowledge at his perill: But if the condition had been that he should repaire such houses as hee to whom he was bound should assigne, and after he assigneth certaine houses to be repaired, but he that is bound hath no knowledg of that assignement, that ignorance shall excuse him in the law, for he hath not bound himselfe to no reparation in certaine, but to such as the party will assign, and if he assigne none he is bound to none: & therefore sith hee that should make the assignment is privy to the deed, hee is bound to give notice of his owne assignment: but if the assignement had been appointed to a stranger, then the obligor must have taken knowledge of the assignement at his perill. Also if a man buy Lands whereunto another hath title which the buyer knoweth not that ignorance excuse him not in the law no more then it doth of goods. Also if a servant come with his masters horse to a Towne that by custome may attach goods for debt, & upon a plaint against the servant, an officer of the Towne by information of the party attacheth the Masters horse, thinking that it were the servants horse, that ignorance excuseth him not; for when a man will doe an act to enter into land, seise goods take a distresse, or such other, hee must by the law at his perill see that that hee doth bee lawfully done, as in the

the case before rehearsed. And in like wise if a Sheriffe by a Replevin deliver other beasts, then were distrained, though that the party that distrained shew him they were the same beasts, yet an action of trespass lyeth against him, and ignorance shall not excuse him: for he shall bee compelled by the law, as all officers commonly be, to execute the Kings writ at his perill, according to the tenor of it, and to see that the act that he doth be lawfully done. But otherwise it is after some men, if upon a Summons in a Pracipe quod reddat, the Sheriffe by information of the demandant, summoneth the tenant in another mans lands, thinking it for the tenants land there they say he shall be excused, for in that case he doth not seise the land, ne take possession in the land, but onely doth summon the tenant upon the land, and the writ commandeth him not that he shall summon the tenant upon his owne land, but generally that he shall summon him and knoweth not in what land, & then by an old Maxime in the law it is taken, that he shall summon him upon the land in demand: and therefore though he mistake the land and be ignorant of it, yet if the Demandant informe him that that is the Land that he demandeth, that sufficeth to the Sheriffe as to his entry for the summoning as they say, though it be not the tenants. And here I make an end of these questions for this time. Do. I pray thee yet ere we depart take a little more pains in my desire. St. What is that? D. That thou wouldst shew me thy mind in divers cases of the Law of the realm, which (as me seemeth) stand not so clearly

with

with conſcience as they ſhould doe. And therefore I would gladly hear thy conceit therein, how they may ſtand with conſcience S. That the caſes and I ſhall with good will ſay as I think to them.

§ The firſt queſtion of the Doctor, How the law of England may be ſaid reaſonable, that prohibiteth them that be arraigned upon an Indictment of felony or murther, to have counſell.

Chap. 48.

ME thinketh that the law in that point is very good and indifferent, taking the law therein as it is. D. Why, what is the law in this point? S. The law is as thou ſaiſt that hee ſhall have no counſell: but then the law is farther that in all things that pertaine to the order of pleading, the Judges ſhall ſo inſtruct him and order him, that he ſhall runne into no jeopardy by his miſpleading: As if he will plead that he never knew the man that was ſlaine, or that he had never a penny worth of goods that is ſuppoſed that he ſhould ſtale, in theſe caſes the Judges are bound in conſcience to informe him that he muſt take the generall iſſue, and plead that he is not guilty: for though they be ſet to be indifferent betweene the king and the party as to the party and to the principall matter, as they be in all other matters, yet they bee in this caſe to ſee that the party take no hurt in forme of pleading in ſuch matters,

ters, as he shall shew to be the truth of the matter, and that is a great favour of the law: for in appeals, though the Justices of favour will most commonly help forth the party, and sometime his Counsell also in the forme of pleading, as they doe also many times in common plees, yet they might in those cases if they would bid the party and his Counsell plead at their perill. But they may not doe so with conscience upon indictments as me seemeth: for it were a great unreasonablenesse in the Law, if he should prohibite him that standeth in jeopardy of his life, that he should have no counsell, & then to drive him to plead after the straite rules, and formalities of the law, that he knoweth not. D But what if hee bee knowne for a common offendor, or that the Judges know by examination, or by an evident presumption that he is guilty, and he asketh Sanctuary, or pleadeth Misnosmer, or have some Record to pleade, that he cannot pleade after the forme, may not the Judges in such cases bid him plead at his perill? St. I suppose they may not, for though he be a common offendor, or that he be guilty, yet he ought to have that the Law giveth him, and that hee shall have the effect of his plees, and of his matters entred after the forme of the Law: And also sometime a man by examination, and by witnesse may appeare guilty that is not: And in like wise there may be a vehement suspition that hee is guilty, and yet he is not guilty, and therefore for such suspition, or vehement presumptions me thinketh a man may not with conscience be put from that he ought to have

by

by the law, ne yet although the Judges knew it of their owne knowledge: but if it were in appeale, I suppose that the Judges might doe therein as they shall thinke best to be done in conscience: for there is no Law that bindeth them to instruct him (but as they do commonly to the parties of favor in all other cases) but they may if he will bid him plead at their perill by advice of their counsell; and if the appellee be poore, and have no counsell, the court must assigne him counsell if he aske it, as they must do in all other places, and that me thinketh they are bound to do in conscience, though the appellee were never so great an offendor, & though the Judges knew never so certainly that he were guilty, for the law bindeth them to do it. And so methinketh that there is great difference betweene an indictment & an appeale. And the reason why the law prohibiteth not counsell in appeale, as it doth in an indictment, I suppose is this: there is no appeale brought, but that of common presumption the appellant hath great malice against the appellee, as when the appeale is brought by the wife of the death of her husband, or by the sonne of the death of his Father, or that an appeale of robbery is brought for stealing of goods. And therefore if the Judges should in those cases shew themselves to instruct the appellee, the appellants would grutch and think them partiall, and therefore as well for the indemnity of the Court, as of the appellee in case that he be not guilty, the law suffereth the appellee to have counsell. but when that a man is indicted at the

Kings

Kings suit, the King intendeth nothing but justice with favor, and that is to the rest and quietnes of his faithfull subjects, and to pull away misdoers among them charitably, and therefore he will be contented that his Justices shall helpe forth the offendours according to the truth, as far as reason and justice may suffer. And as the King will be contented therein, it is to presume that the Counsel will be contented, and so there is no danger thereby, neither to the Court, ne to the party. And as I suppose for this reason it began that they should have no counsell upon indictments, and that hath so long continued that it is now growne into a custome, & into a Maxime of the law, that they shall none have. D. What if the Judges knew of their owne knowledge that the indictee is guilty and then he pleadeth Autrefoits acquit arraigned, and acquit of the same murder, or felony, and the Judges of their owne knowledge know that the plea is untrue, may they not then bid him plead at his perill? S. I think yea, but if they know of their owne knowledge that he were guilty of the murther or felony, but that the plea was untrue they knew not, but by conjecture or information, I think they might not then bid him plead at his perill.

§ The second question of the Doctor, whether warranty of the yonger brother, that is taken as heir because it is not known but that the eldest brother is dead, be in conscience a bar unto the eldest brother, as it is in the law.

Chap.

Chap. 49.

A Man seised of lands in fee, hath issue two sonnes; the eldest sonne goeth beyond the Sea, and because a common voice is that he is dead, the yonger brother is taken for heire, the father dyeth, the yonger brother entreth as heir, and aliyneth the land with a Warranty & dyeth without any heire of his body, and after the elder brother commeth againe and claimeth the land as heire to his father. whether shall he be barred by that Warranty in conscience as he is in the law? S. It is a Maxime in the Law, that the eldest brother shall in that case be barred, and that Maxime is taken to bee of as strong effect in the Law, as if it were ordained by statute to be a barre. And it is as old a law that such a warranty shall barre the heire, as it is, that the inheritance of the father shall onely descend to the eldest sonne. And sith the law is so, why then should not conscience follow the Law, as well as it doth in that point, that the eldest sonne shall have the land. Do. For there appeareth no reasonable cause whereupon the Maxime might have a lawfull beginning: For what reason is it that the warranty of an ancestor that hath no right to land, should barr him that hath right? And if it were ordained by Statute, that one man should have another mans land, and no cause is expressed why he should have it, in that case though he might hold the land by force of that statute yet he could not hold it in conscience, without there

were

were a cause why he should have it, and these cases be not like as me seemeth to the forfeiture of goods by an Outlawry; for I will agree for this time, that that forfeiture standeth with conscience, because it is ordained for minister-tion of justice, but I cannot perceive any such case here: and therefore me thinketh that this case is like to the Maxime, that was at the com-mon Law of Wrecke of the Sea, that is to say, that if a mans goods had been wrecked upon the sea, that the goods should have been immediately granted to the King. And it is holden by all Doctors that the Law is against conscience, except in certaine cases that were too long to re-hearse now. And it was ordained by the statute of Westminster the 1. that if a Dogge or Cat came a'live to the land, that the owner, if he may prove the goods within a yere and a day to bee his, shall have them, whereby the said Law of wrecke of the sea, is made more sufferable then it was before: and some thinke in this case that this warranty is no barre in conscience, though it be a barre in the law. S. I pray thee keep that case of wrecke of the sea in thy remembrance, and put it hereafter as one of thy questions, and thereupon shew me thy further mind therein, and I shall with good will shew thee my minde: and as to this case that we be in now, me thin-keth the Maxime whereby the warranty shal be a barre, is good and reasonable, for it seemeth not against reason that a man shall be bound, as to temporall things, by the act of his ancestor to whom he is heire: for like as by the law it is ordained, that hee shall have advantage by

the same ancestor, and have all his lands by discent if he have any right, so it seemeth that it is not unreasonable, though the law for the vnitie of blood that is betweene them suffer him to have a disadvantage by the same ancestor; but if the Maxime were, that if any of his ancestors, though he were not heire to him, made such a warranty, that it should be a barr. I think that Maxime were against conscience, for in that case there were no ground, nor consideration to prove how the said Maxime should have a lawfull beginning, wherefore it were to be taken as a Maxime against the law of reason: but me thinketh it is otherwise in this case, for the reason that I have made before. D. If the father bind him and his heires to the payment of a debt and dye, in that case the sonne shall not bee bound to pay the debt, unlesse he have assets by discent from his father. And so I would agree, that if this man have assets by discent from the ancestor that made the warranty, that he should have been barred: but else me thinketh it should stand hardly with conscience that it should be a barre. Stu. In the case of the obligation, the law is as thou saist, and the cause is, for thus the Maxime of the law in that case is none other, but that he shall be charged if he have assets by discent: but if the Maxime had been generall, that the heire should bee bound in that case without any assets, as if it were ordained by Statute, that it should be so, I thinke that both the Maxime and the statute, should well stand with conscience. And like law is where a man is bounded

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as heire, he may enter as he that hath nothing by diſcent, but where he claimeth the land in his owne right, there the warranty of his anceſtor ſhall be a bar to him, though he have no aſſets from the ſame anceſtor, and though it be ſaid in Ezechiel chap. 18 That the Son ſhall not bear the wickedneſſe of the Father, that is underſtood ſpiritually. But as to temporall goods the opinion of Doctors is, that the ſonne ſometime may beare the offence of his Father. Do. Now that I have heard thy mind in this caſe, I will take advizement therein till a better leaſure, and will now proceed to another queſtion Stu. I pray thee do as thou ſaiſt, and I ſhall with good will make anſwer thereto as well as I can.

¶ The third queſtion of the Doctor, If a man procure a collateral warranty, to extinct a right that he knoweth another man hath to land, whether it be a barre in conſcience as it is in the Law or not.

Chap. 50.

A Man is diſſeiſed of certaine land, the diſſeiſor ſetteth the land, &c, the alience knowing of the diſſeiſin, obtaineth a releaſe with a warranty of an anceſtor collaterall to the diſſeiſee that knoweth alſo the right of the diſſeiſee, that anceſtor collaterall dyeth after whoſe death the warranty deſcendeth upon the diſſeiſee. Whether may the alienee in that caſe hold the land

in conscience as he may by the law. St. With the warranty is discended upon him, whereby he is barred in the law, mee thinketh that he shall also be barred in conscience, and that this case is like to the case in the next Chap. before, wherein I have said that (as me thinketh) it is a bar in conscience. D. Though it might be taken for a bar in conscience in that case, yet me thinketh in this case it cannot: for in that case the younger brother entred as heire, knowing none other but that he was heire of right, and after when he sold the land, the buyer knew not but that he that sold it had good right to sell it, and so he was ignorant of the title of the eldest brother, and that ignorance came by the default and absence of himselfe, that was the eldest brother. But in this case as well the buyer, as he that made the collaterall warranty, knew the right of the disseisee, and did that they could to extinct the right, and so they did as they would not should have been don to them: so it seemeth that hee that hath the land may not with conscience keep it. Stu. Though it be as thou saist that all they offended in obtaining of the said collaterall warranty, yet such offence is not to be considered in the law, but it be in very speciall cases: for if such alledgings should be accepted in the law, releases, and other writings should be of small effect, and upon every light surmise, all writings might come in tryall, whether they were made with conscience or not. Therefore to abide that inconvenience, the law will drive the party to answer onely whether it bee his deed or not, and not whether the deed were

made

made with conscience or against conscience, and though the party may bee at a mischiefe thereby, yet the law will rather suffer the mischiefe then the said inconvenience. And like law is if a woman Covert for dread of her husband by compulsion of him levy a Fine, yet the woman after her husbands death, shall not be admitted to shew that matter in avoiding of the Fine, for the inconvenience that might follow thereupon. And after the opinion of many men, there is no remedy in these cases in the Chancery: for they say that where the common law in cases concerning inheritance putteth the party from any averment for eschewing of an inconvenience that might follow of it among the people, that if the same inconvenience should follow in the Chancery if the same matter should be pleaded there, that no Subpœna should lye in such cases, and so it is in the cases before rehearsed: Forasmuch vexation, delay, costs, and expences might grow to the party if he should be put to answer to such averments in the Chancery, as if he were put to answer to them at the common Law: and therefore they thinke that no Subpœna lyeth in the said cases, ne in other like unto them. Nevertheless I do not take it that their opinion is that hee that bought the land in this case may with good conscience hold the land, because he shall not be compelled by no law to restore it, but that he is in conscience and by the law of reason bound to restore it or otherwise to recompence the party, so as hee shall be contented. and I suppose verily it is so, if he will keepe his soule out of peril and dan-

danger. And after some men to these cases may be resembled the case of a fine with nonclaim that is remembred before in the 14 Chap of this booke, where a man knowing another to have right to certaine land, causeth a fine to be levied thereof with proclamation, & the other suffereth 5 yeares to passe without claime, in that case he hath no remedy neither by common law, nor by Subpœna, and that yet he that levied the fine, is bound to restore the land in conscience. And me thinketh I could right well agree that it should be so in this case, and that specially because the party himselfe knoweth perfectly that the said collaterall warranty was obtained by covin and against conscience.

§ The fourth question of the Doctor is of the wreck of the Sea.

Chap. 51.

I Pray thee let me now heare thy mind how the law of England concerning goods that be wrecked upon the sea may stand with conscience, for I am in great doubt of it S. I pray thee let me first heare thine opinion what thou thinkest therein D. The statute of West. the 1. that speaketh of wrecke, is, that if any man, dog, or cat, come alive into the land out of the Ship or Barge, that it shall not be judged for wrecke, so that if the party of whom the goods belong come within a yeare and a day and prove them to be his that he shall have them, or else that they shall remaine to the King. And me thinketh that

that the said Statute standeth not with conscience, for there is no lawfull cause why the party ought to forfeit his goods, as the King or Lords ought to have them, for there is no cause of forfeiture in the party, but rather a cause of sorrow and heavinesse. And so the Law seemeth to add sorrow upon sorrow; and therfore doctors hold commonly, that he that hath such goods is bound to restitution, and that no customs may help, for they say it is against the commandment of God, Levit. 19. where it is commanded, that a man should love his neighbour as himselfe, and that they say he doth not, that taketh away his neighbours goods: but they agree that if any man have cost and labour for the saving of such goods wrecked, specially for such goods as would perish if they lay still in the water, as Sugar, Pepper, Salt, Meale, and such other, that he ought to be allowed for his coste and labour, but he must restore the goods, except he could not save them without putting his life in jeopardy for them and then if he put his life in such jeopardy, & the owner by common presumption had had no way to have saved them, then it is most commonly holden, that he may keep the goods in conscience: but of other goods that would not so lightly perish, but that the owner might of common presumption save them himselfe, or that might be saved without any perill of life, the takers of them be bound to restitution to the owner, whether he come within the year or after the year.

And me thinketh this case is somewhat like to a case that I shall put: if there were a Law

and a custome in this realme, or if it were ordained by statute, that if any alien came through the realme in pilgrimage, and dyed that all his goods should be forfeit, that Law should be against conscience, for there is no cause reasonable why the said goods should bee forfeit: And no more me thinketh there is of wrecke S. There be divers cases where a man shall leese his goods and no default in him: as where beasts stray away from a man, and they be taken up and proclaimed, and the owner hath not heard of them within the yeere and a day, though he made sufficient diligence to have heard of them, yet the goods be forfeited and no default in him: and so it is where a man killeth another with the sword of J. at Stile, the sword shall be forfeit as a Deodane, and yet no default is in the owner, and so me thinketh it may be in this case, and that sith the common Law before the said statute was, that the goods wrecked upon the sea, shall be forfeit to the King, that they be also forfeit now after the Statute except they be saved by following the Statute, for the Law must needs reduce the properties of all goods to some man, and when the goods be wrecked, it seemeth the property is in no man: but admit that the property remaine still in the owner, then if the owner percase would never claime, then it should not be knowne who ought to take them: and so might they be destroyed, and no profit come of them: wherefore me thinketh it reasonable, that the law shall appoint who ought to have them, and that hath the law appointed to the King as Sovereigne and head

over

ther the people. Do. In the case that thou hast put before of the stray and Deodand, there be considerations why they be forfeit, but it is not so there: and me thinketh that in this case, it were not unreasonable that the law would suffer any man that would take them, to take and keep them to the use of the owner, saving his reasonable expences, & this me thinketh were more reasonable law, then to pull the property out of the owner without cause. But if a man in the sea cast his goods out of the ship as forsaken, then doctors hold that every man may take them lawfully that will. But otherwise it is (as they say) if he throw them out for fear that they should overcharge the ship.

S. There is no such Law in this Realme of goods forsaken: For though a man waive the possession of his goods and saith he forsaketh them, yet by the law of the Realme the property remaineth still in him, and he may seise them after when he will: And if any man in the meane time put the goods in safegard to the use of the owne, I thinke he doth lawfully, and that he shall be allowed for his reasonable expences in that behalfe, as he shall be of goods found, but he shall have no property in them, no more then in goods found. And I would agree, that if a man prescribe, that if he find any goods within his mano^r, that he should have them as his owne, that that prescription were hold: for there is no consideration how the prescription might have a lawfull beginning, but in this case me thinketh there is. Do. What is that? S. It is this: The King of the old cu-

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Some of the Realme, as the Lord of the narrow sea, is bound as it is said hath to scowre the sea of the Pirats & petty robbers of the sea. And so it is read of the noble King Saint Edgar, that he would twice in the yeare scowre the sea of such Pirats: but I mean not thereby that the King is bound to conduct his Merchants upon the sea against all outward enemies, but that he is bound only to put away such Pirats and petty robbers. And because that cannot be done without great charge, it is not unreasonable if her have such goods as be wrecked upon the sea towards the charge Do. Upon that reason I will take a respit till another time.

§ The fifth question of the Doctor, whether it stand with conscience to prohibite a Jury of meat and drink till they be agreed.

Chap. 52.

If one of the xii. men of an enquest know the very truth of his owne knowledge, and instructeth his fellowes thereof, and they will in no wise give credence to him, and thereupon because meat and drinke is prohibited them, he is driven to that point, that either he must assent to them and give their verdict against his owne knowledge, and against his own conscience, or dye for lack of meat: how may the law then stand with conscience that will drive an innocent to that extremity, and be either forsworne, or to be famished & dye for want of meat. Sr. I take not the law of the realms to be, that the Jury after

they

they be sworne may not eat nor drink till they be agreed of the verdict: but truth it is there is a Maxime, and an old custome in the law, that they shall not eate nor drinke after they bee sworne till they have given their verdict, without assent and licence of the Justices: and that is ordained by the law for eschewing of divers inconveniencies that might follow thereupon, and that especially if they should eat or drinke at the costs of the parties, and therefore if they doe contrary, it may be laid in an arrest of the judgement: But with the assent of the Justices they may both eat and drinke; As if any of the Jurors fall sicke before they be agreed of their verdict so fore that he may not commune of the verdict, then by the assent of the Justices he may have meat and drink, and also such other things as be necessary for him and his fellowes also at their own costs, or at the indifferent costs of the parties if they so agree, or by the assent of the Justices, may both eate and drinke: and therefore if the case happen that thou now speakest of, and that the Jury can in no wise agree in that verdict, and that appeareth to the Justices by examination, the Justices may in that case suffer them to have both meat and drinke for a time to see whether they will agree, and if they will in no wise agree, I think that the Justices may see such order in the matter, as shall seeme to them by their discretion to stand with reason and conscience, by awarding of a new Enquest, and by setting fine upon them that they shall find in default, or otherwise as they shall thinke best by their discretion, like

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as they may doe if one of the Jury dye before verdict, if any other like casualties fall in that behalfe. But what the Justices ought to do in this case that thou hast put in their discretion, I will not treat of at this time.

§ The 6. question of the Doctor, whether the colours that be given at the common law in Assises, actions of trespass, and divers other actions, stand with conscience, because they be most commonly feined, and be not true.

Chap. 53.

I pray thee let me heare thy mind to what intent such colours be given, and sith they be commonly untrue, how they may stand with conscience? S. The cause why such colours be given, is this: There is a Maxime and a ground of the Law of England, and if the defendant or tenant in any action plead a plea that amounteth to the generall issue, that he shall be compelled to the generall issue, and if he will not, he shall be condemned for lacke of answer, and the generall issue in Assise is, that he that is named the tenant hath done no wrong, nor no disseisin. And in a writ of Entrie in the nature of Assise the generall issue is, that he disseised him not. And in an action of Trespas that he is not guilty, and so every action hath a generall issue assigned by the Law, and the Tenant must of necessity either take the generall issue or plead some plea in abatement of the writ, to the jurisdiction, to the party, or else some barre or some matter by way of conclusion. And therefore if

I at Stile feoffee H Hart of land, and a stranger bringeth an Assise against the said H. Hart, for the land, whose title he knowes not: In this case if he should be compelled to plead to the point of the Assise, that is to say, that he hath done no wrong, ne no disseisin, the matter should be put in the mouths of 12. lay men, which be not leaened in the law, and therefore better it is that the law be so ordered, that it be put in the determination of the Judges, then of lay men. And if the said H. Hart in the case before rehearsed, would plead a barre of the Assise that Jo. at Stile was seised and enfeoffed him, by force whereof he entred and asked judgement, if that Assise should lye against him, that plee were not good, for it amounteth but to the generall issue, and therefore he shall be compelled to take the generall issue, or else the Assise shall bee awarded against him for lacke of answer. And therefore to the intent the matter may be shewed and pleaded before the Judges, rather than before the Jury, the tenants use to give the plaintife a colour, that is to say, a colour of action, whereby it shall appeare that it were hurtful to the tenant to put that matter that he pleadeth to the judgment of 12. men: the most common colour that is used in such case is this, when he hath pleaded that such a man enfeoffed him, as before appeareth, it is used that he shall plead farther, and say that the plaintife claiming by a colour of a deed of feoffement made by the said feoffor, before the feoffement made to him where no right passed by the deed, entred, upon whom he entred and asked judgement if

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the will lie against him. In this case because it appeareth to be a doubt to unlearned men, whether the land passe by the deed without livery or not, therefore the law suffereth the tenant to have that speciall matter to bring the matter to the determination of the Judges. And in such cases the Judges may not put the tenant from the plee, for they know not as Judges but that it is true, and so if any default be, it is in the tenant and not in the Court. And though the truth bee, that there were no such deed of feoffement made to the plaintife as the tenant pleadeth, yet me thinketh there is no default in the tenant, for he doth it to a good intent as before appeareth. D. If the tenant know that the feoffor made no such deed of feoffement to the plaintife, then there is a default in the tenant to plead it: for he wittingly saith against the truth, and it is holden by all Doctors, that every lie is an offence more or lesse, for if it be of malice and to the hurt of his neighbour, that is called Mendacium perniciosum, and that is deadly sinne: and if it be in sport, and to the hurt of no man, nor of custome used, nor of pleasure that he hath in lying: then it is venniall sin, and it is called in latin, mendacium jocosum: and if it be to the profit of his neighbour and to the hurt of no man, then it is also venial sin, and it is called in latin, mendacium officiosum: and though it be the least of those three, yet it is a venniall sin and would be eschewed. Stu. Though the Midwives of Ægypt lyed when they had reserved the male children of the Hebrewes, saying to the King Pharaoh, that

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the Hebrewes had women that were cunning in the same craft, which ere they came had reserved the children alive, where indeed they themselves of pity and of dread of God reserved them. Yet Saint Hierome expounded the text following, which saith, that our Lord therefore gave them houses, that is to be understood, that he gave them spirituall houses, and that they had therefore eternall reward: and if they sinned by that lye, although it were but veniall, yet I cannot see how they should have therefore eternall reward. And also if a man intending to slay another, aske me where that man is, is it not better for me to lye, and say, I cannot tell where hee is, though I know it, then to shew where hee is, whereupon murder should follow? Doct. The deed that the Midwives of Ægypt did in saving the Children was meritorious, and deserved reward everlasting (if they beleeved in God) and did good deeds beside, as it is to suppose they did, when they for the love of God, refused the death of the Innocents: and then though they made a lye after, which was but veniall sinne, that could not take from them their reward, for a veniall sinne doth not utterly extinct charity, but letteth the fervour thereof: and therefore it may well stand with the words of Saint Hiereme, that they had for their good deed eternall houses, and yet the lye that they made to be a veniall sinne: but nevertheless if such a lye that is of it selfe but veniall, be affirmed with an oath, it is alway mortal if he knew it be false that he sweareth. And as to the other

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queſtion, it is not like to this queſtion that we have in hand as me ſeemeth: for ſometime a man for eſchewing of the greater evill may doe a leſſe evill: and then the leſſe is no offence in him, and ſo it is in the caſe that thou haſt put wherin becauſe it is leſſe offence to ſay, he wotteth not where he is, though he know where he is, then it is to ſhew where hee is, whereupon murther ſhould follow, it is therefore no ſin to ſay he wotteth not where he is: for every man is bound to love his neighbour, and if he ſhew in this caſe where he is, knowing his death ſhould follow thereupon, it ſeemeth that her loved him not, nethat he did not to him as he would be done to: But in the caſe that we be in here, there is no ſuch ſin eſchewed: For though the party pleadeth the generall iſſue, the Jury may finde the truth in every thing, and therefore in that he ſaith that the plaintife claiming in by the colour of a deed of feoffment, where nought paſſed, entred, &c. knowing that there was no ſuch feoffment it was a lye in him and a venial ſinne, as me thinketh. And every man is bound to ſuffer a deadly ſinne in his neighbour, rather then a venial ſinne in himſelfe.

S. Though the Jury upon a generall iſſue, may finde the truth as thou ſaiſt, yet it is much more dangerous to the Jury to enquire of many points, then to enquire onely of one point. And foraſmuch as our Lord hath given a commandement to every man upon his neighbour: therefore every man is bound to force as much as in him is, that by him no occaſion of offence come to

his

his neighbour. And for the same cause, the law hath ordained divers maximes and principles, whereby issues in the Kings court may be joined upon one point in certain as nigh as may be, and not generally, lest offence might follow thereupon against God, & a hurt also unto the Jury, wherefore it seemeth that he leveth not his neighbour as himself, ne that he doth not it as he would bee done to, that offereth such danger to his neighbor where he may well and conveniently keep it from him. if he will follow the order of the law, & it seemeth that he putteth himself wilfully in jeopardy that doth it, and it is written Eccle. 3. Qui amat periculum, in illo peribit, that is to say, he that loveth perill shall perish in it. and he that putteth his neighbor in perill to offend, putteth himselfe in the same, and so should he doe, mee seemeth, that would wilfully take the generall issue, where he might conveniently have the speciall matter: and furthermore it is no offence in Princes and Rulers to suffer contracts, and buying and sellings in markets and Faires, though both perjury and deceipt will follow thereupon, because such contracts be necessary for the common wealth: so it seemeth likewise, that there is no default in the party that pleadeth such a speciall matter to avoid from his neighbor the the danger of perjury, ne yet in the court though they induce him to it, as they doe sometime for the intent before rehearsed. And in like wise some will say that if rulers of Cities & commonalities, sometime for the punishment of felons, murderers and such other offenders will (to the intent they would have them to con-

falle the truth) say to them that be suspected that they be informed of such certaine defaults, or misdemeanors in the offendors, and that they do to be intent to have them to confesse the truth, that though they were not so informed, that yet it is no offence to say they were so informed, because they do it for the common wealth: for if offendors were suffered to go unpunished, the common wealth should ofttoones decay and utterly perish.

D. I will take advisement upon thy reason in this matter till another season, and I will now aske thee another question somewhat like unto this. I pray thee let me heare thy mind therein.

St. Let me heare thy question, and I shall with good will say as I thinke therein.

§. The 7. question of the Doctor, concerning the pleading in Assise, whereby the tenants use sometime to plead in such manner that they shall confesse no Ouster.

Cap. 54.

IT is commonly used as I have heard say, that when the tenant in assise pleadeth that a stranger was seised and enfeoffed him, and giveth the plaintife a colour in such manner as before appeareth in the xlviii. Chapter, that the tenant many times when he hath pleaded thus, and the plaintife claiming by a colour of a deed of feoffement made by the said stranger, where nought passed by the deed, entred, and

and that then they use to say further upon whom J. S. entred, upon whom the tenant entred where indeed the said J. S. never entred, no happily there was never no such man: how can this pleading be excused by an untruth, and what reasonable cause can be why such a pleading should be suffered against the truth? St. The cause why that manner of pleading is suffered, is this: If the tenant by his pleading confessed an immediate entry upon the plaintife, or an immediate putting out of the plaintife, which in French is called an ouster, then if the title were after found for the plaintife, the tenant by his confession were attainted of the disseisin. And because it may be, that though the plaintife, habe good title to the land, that yet the tenant is no disseisor; Therefore the tenants use many times to plead in such manner as thou hast said before, to save themselves from confessing of an Ouster. and so if there be any default, it is not in the Court, ne in the law, for they know not the truth therein till it be tried: & me thinketh also that there is in this case right little default or none in the tenant nor in his counsel, specially if the counsell know that the tenant is no disseisor. But as to that point I pray thee that thou as then hast taken a respit to be advised, or that thou shew thy full mind in the question of a colour given in Assise, whereof mention is made in the said 48. Chapter: that I therewith may have a like respit in this case till another time. to be advised, and then I shall with good will shew thee my full mind therein.

D. I am content it be as thou saist, but I pray thee that I may yet adde another question to the 2. questions before rehearsed of the colours in assise, and feele thy minde therein, because that soundeth much to the same effect that the other do (that is to say) to prove that there be divers things suffered in the law to be pleaded that bee against the truth: And I pray thee let me hereafter know thy mind in all three questions, and thou shalt then with a good will know mine. St. I pray thee shew me the case that thou speakest of. D. If a man steale a horse secretly in the night, it is used that thereupon he shall be indicted at the Kings suit, and it is used that in that indictment it shall be supposed that he such a day, and place with force of armes, (that is to say) with staves, swords, and knives, &c. feloniously stole the horse against the Kings peace, & that forme must be kept in every indictment, though the felon had neither sword nor other weapon with him, but that he came secretly without weapon. How can it therefore be excused, but that therein is an untruth? St. It is not alledged in the indictment by matter in deed that hee had such weapon, for the forme of an indictment is this.

Inquiritur p dño Rege, si A. tali die & Anno apud talem locum vi & armis, videlicet gladiis, &c. talem equum talis hominis cepit, &c.

And then if the twelve men be onely charged with the effect of the bill, that is to say, whether he be guilty of the felony or not, and not whether hee be guilty under such manner and forme as the bill specifieth or not: and so when they

they say billa vera, they say true as they take the effect of the bill to bee. And therefore if there were false latin in the bill of indictment, and the Jury saith billa vera, yet their verdict is true: for their verdict stretcheth not to the truth or falshood of the latin, but to the felony: nor to the forme of the words, but to the effect of the matter, and that is to enquire whether there were any such felony done by the person or not: and though the bill vary from the day, from the year, and also from the place where the felony was done in, so it vary not from the shire that the felony was done in, and the Jury saith billa vera, they have given a true verdict, for they are bound by their oath to give the verdict according to the effect of the bill, & not according to the form of the bil. And so is he that maketh a vow bound likewise to that that by the law is the effect of his avow, and not onely to the words of his avow. And if a man avow never to eat white meat, yet in time of extreame necessity, he may eat white meat rather then dye, and not break his avow, though he affirmed it with an oath: for by the effect of his avow, extreame necessity was excepted, though it were not expressly excepted in the words of the avow: and so likewise though the words of the Bill be to enquire whether such a man such a day and yeare, and in such a place did such a felony, yet the effect of the Bill is to enquire whether he did the felony within the shire or no: and therefore the Justices before whom such indictments be taken, most commonly inform the Jury that they are bound to regard the effect of the bill, and not the forme.

And therefore there is no untruth in this case neither in him that made the bill, ne yet in the Jury as me seemeth D. But if the party that owed the horse bring an action of trespasse, and declareth that the defendant took the horse with force and armes, where he tooke him without force and armes: how may the plaintife there be excused of an untruth? S. And if the plaintife surmise an untruth, what is that to the Court, or to the law, for they must beleeve the plaintif, till that that he saith he denied by the defendant. And yet as this case is there is no untruth in the plaintif, to say he took the horse with force and armes, though he came never so secretly and without weapon, for every trespasse to in the law done with force and armes, so that if he be attainted and found guilty of the trespass, he is attainted of the force and armes: And sith the law adjudgeth every trespasse to be done with force, therefore the plaintif saith truely that he took him with force, as the law meaneth to be force. For though he took the horse as a felon, yet upon the felonious taking, the owner may take an action of trespasse if he will, for every felony is a trespasse and more. And so I have shewed thee some part of my mind to prove that in those cases there is no untruth, neither in the parties, neither in the Jury, nor in the Law. Nevertheless, at a better leasure I will shew thee my mind more fully therein with good will as thou hast promised me to doe in the cases of colours of the Writ, and of the Master, that be before rehearsed.

S. The

§. The viii. question of the Doctor, whether the Statute of xlv. of Edward the third of Silva cedua stand with conscience.

Cap. 55.

IN the 45. yeare of the raigne of Ed. 3. It was enacted, that a prohibition should lye where a man is impleaded in the Court Christian for Wimes of wood of the age of xx. year or above, by the name of Silva cedua; how may that Statute stand with conscience, that is so directly against the liberty of the Church, and that is made of such things as the Parliament had no authority to make any law of? S. It appeareth in the said Statute, that it is enacted, that a Prohibition should lye in that case, as it had used to do before that time, and if the prohibition lay by a prescription before the Statute, why is not then the Statute good as a confirmation of that prescription? Do. If there were such a prescription before the Statute, that prescription was void, for it prohibiteth the payment of Tythes of trees of the age of xx. year or above, and paying of tythes is grounded aswell upon the law of God, as upon the law of reason, and against these laws lyeth no prescription as it is holden most commonly by all men. S. That there was such a prescription before the said Stat. & that if a man before the said Stat had bin sued in the spirituall court for tythes of wood of the age of xx. year or above, the prohibition lay, as appea-

appeareth in the said statute, and it cannot bee thought that a statute that is made by authority of the whole realme, aswell of the King and of the Lords spirituall & temporall, as of all the commons, will recite a thing against the truth: & furthermore I cannot see how it can be grounded by the law of God, or by the law of reason, that the 10. part should bee paid for tythe and no other portion but that, but I think that it be grounded upon the Law of reason that man should give a reasonable portion of his goods temporall to them that minister to him things spirituall: for every man is bound to honor God of his proper substance, and the giving of such portion hath not been only used among faithfull people, but also among unfaithfull, as it appeareth Gen. 47. where corne was given to the priests in Egypt of common barns. And S. Paul in his Epistles affirmeth the same in many places, as in his first Epistle to the Cor. chap. 9. where he saith, He that worketh in the Church, shall eat of that that belongeth to the Church: And in the Epistle to the Gal. chap. 6. he saith, Let him that is instructed in spirituall things, depart of his goods to him that instructeth him: And S. Luke chap 10. saith, That the workman is worthy to have his hire. All which sayings may right conveniently be taken and applyed to this purpose, that spirituall men which minister to the people spirituall things, ought for their ministration to have a competent living of them that they minister unto. But that the tenth part should be assigned for such a portion and neither more nor lesse, I cannot perceive

that

that that should be grounded by the Law of reason, nor immediately by the Law of God: for before the Law written there was no certaine portion assigned for the spirituall Ministers, neither the 10. part, nor the 12 part, unto the time of Jacob: for it appeareth Gen. 28 that Jacob avowed to pay Dimes which was among the Jews for the 10 part, if our Lord prospered him in his journy, and if the 10 part had been duty before that avow, it had been in vaine to have avowed it, and so it had if it had been grounded by the law of reason: and as to that is spoken in the Evangelists, and in the new law of Tythes, it belongeth rather to the giving of tythes in the time of the old Law, then of the new Law as appeareth Matthew 23. and Luk. 11. where our Lord speaketh to the Pharisees, saying, Woe to you Pharisees that tythe mints, rue, and herbs and forget the judgement and the charity of God, these it behoveth you to doe. and the other to omit; that is to say, it behoveth you to do Justice and Charity of God, and not to omit paying of tythes though it be of small things, as of mints, rue, herbes, and such other. And also that the Pharisee saith Luke. 17. I pay my tythes of all that I have: it is to be referred to the old Law, not to the time of the new Law: Therefore as I take it. the paying of Tythes, or of a certaine portion to spiritual men for their spiritual ministration to the people, hath been grounded in divers manners. First before the law written a certain portion sufficient for the spirituall Ministers was due to them by the Law of nature, which

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after them that be learned in the Law of the Realme is called the law of reason, and that portion is due by all lawes. And in the law written, the Jewes were bound to give the x. part to their priests aswell by the said avow of Jacob, as by the Law of God in the old testament called the Judicials. And in the new law the paying of the x. part, is by a law that is made by the Church. And the reason wherefore the x. part was ordained by the Church to be paid for the tythe, was this, There is no cause why the people of the new law ought to pay lesse to the ministers of the new law, then the people of the old Testament gave to the ministers of the old Testament: for the people of the new Law be bound to greater things then the people of the old Law were, as it appeareth Matth. 5. where it is said: Unlesse your good workes abound above the workes of the Scribes and Pharisees, ye may not enter into the Kingdome of Heaven. And the sacrifice of the old law was not so honourable as the sacrifice of the new Law is: For the sacrifice of the old Law was onely the figure, and the sacrifice of the new law is the thing that is figured, that was the shadow, this is the truth. And therefore the Church upon that reasonable consideration ordained, that the x. part should be paid for the sustenance of the Ministers in the new law, as it was for the sustenance of the Ministers in the old law, and so that law with a cause may be increased for minished to more portion or to lesse as shall be necessary for them. D. It appeareth Gen. 14. that Abraham gave to Melchisedech

tithes

dismes, and that is taken to be the x. part, and that was long before the law written, and therefore it is to suppose that he did that by the law of God. S. It appeareth not by any Scripture that he did that by the commandement of God, nor by any revelation: And therefore it is rather to suppose that he did part of duty, and part of his owne free will. for in that he gave the dismes as a reasonable portion for the sustenance of Melchisedech and his ministers, he did it by the commandement of the Law of reason, as before appeareth, but that he gave the x. part that was of his free will, and because he thought it sufficient and reasonable: but if he had thought the xii part or the xiii part had sufficed, there might have given it, and that with good conscience. And so I suppose that in the new law the giving of the x. part is by a Law of the Church, and not by the law of God unless it be taken that the law of the Church is the Law of God. as it is sometime taken to be, but not appropriately or immediately. for that is taken appropriately to be the Law of God, that is contained in scripture, that is to say, in the old testament and in the new Do It is somewhat dangerous to say that tythes be grounded only upon the law of the Church: for some men, as it is said, say that mans law bindeth not in conscience. and so they might happen to make a boldnesse thereby to deny their tythes S. I trust there be none of that opinion. and if there be it is great pity: And nevertheless they may be compelled in that case by the law of the Church to paythem tythes as wel as they should be if paying

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of tythes were grounded meerly upon the law of God, D. I think well it be as thou saist, and therefore I hold me contented therein. But I pray thee shew me thy mind in this question. If a whole Countrey prescribed to pay no tyths for corne or hay, nor such other, whether thou thinke that that prescription is good. Stu. That question dependeth much upon that that is said before: for if paying of the x part be by the law of reason or by the law of God, then the prescription is void, but if it be by the law of man, then it is a good prescription, so that the Ministers have a sufficient portion beside. D. Iohn Gerson which was Doctor of divinity, in a treatise that he named Regulæ morales, saith, that Dismes be payd to the Priests by the law of God &c. The words that he speaketh there of the matter be these, Solvuo decimarum sacerdotibus, est de jure divino, quatenus inde sustententur: sed quoad tam hanc vel illam assignare, aut in alios redditus commutare, posi ivi juris existit, that is as much to say, the paying of dismes to Priests, is of the law of God, that they may thereby be sustained, but to assigne this portion or that, or to change it to other rents, that is by the law positive: & if it should be taken that by that word decimarum, which in English is called Dismes or tyths, that he meant the x part & that that x. part should be paid for tyth by the law of God, then is the sentence that followeth after against that saying: for as it appeareth above, the next saith afterward thus, but to assigne this portion or that, or to change it into other rents belongeth to the law positive, that is, to the law

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of men, and if the x. part were assigned by God then may not a lesse part be assigned by the Law of man, for that should be contrary to the Law of God, and so it should be void. And me thinketh, that it is not likely that so famous a clerk would speak any sentence contrary to the Law of God, or contrary to that hee had spoken before: and to prove hee meant not by the term Decimæ, that dismes should alway be taken for the x part, it appeareth in the 4. part of his workes in the 31. title Literæ, where he saith thus, Non vocatur portio curatis debita propterea decimæ eo quod semper sit decima pars, immo est interdum vicesima aut tricesima: That is to say, the portion due to curats is not therefore called dismes, for that it is alway the x. part, for sometime it is the xx. or the xxx. part: & so it appeareth that by this word decimarum, hee meant in the text before rehearsed a certaine portion, & not precisely the x part, and that the portion should be paid to Priests by the Law of God to sustain them with, taking as it seems the law of reason in that saying for the law of God, as it may one way be well and conveniently taken: because the law of reason is given to every reasonable creature by God. And then it followeth pursuantly that it belongeth to the law of man to assigne this portion or that as necessity shall require for their sustenance, and then his saying agreeth well to that that is said before, that is to say, that a certaine portion is due for Priests, for their spirituall ministration by the law of reason. And then it would follow thereupon, that if it were ordained for a law, that all pay-

paying of tythes should from henceforth cease, & that every curat should have assigned to him such certaine portion of land rent or annuity as should be sufficient for him, & for such ministers as should be necessary to be under him, according to the number of the people there, or that every Parishioner or houlholder should give a certaine sum of money to that use, I suppose the law were good: & that was the meaning of Jo. Gerson, as it seemeth in his words before rehearsed, where he saith, but to change tythes into other rents, is by the law positive, that is to say, by the law of man. And some thinke that if a whole countrey prescribe to be quit of both tythes of corne or grasse, so that the Spiritual Ministers have a sufficient portion beside to live upon, that is a good prescription, and that they should not offend, that in such Countries paid no tythes: for it were hard to say, that all the men of Italy, or of the East parts bee damned because they pay no tythes, but a certaine portion after the custome: Therefore certaine it is, to pay such a certaine portion, & well they as all other be bound, if the Church aske it, any custome notwithstanding. But if the Church aske it not, it seemeth that by that not asking, the Church remitteth it & an example thereof we may take of the Apostle Paul, that though he might have taken his necessary living of them that he preached to, yet he took it not, and nevertheless they that gave it him, did not offend because he did not aske it. But if one man in a town would prescribe to be discharged of tythes of corne and grasse, me thinketh the prescription

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is not good, unleſſe he can proue that he recompenceth it in another thing: for it ſeemeth not reaſonable that he ſhould pay leſſe for his tythes then his neighbours do, ſeeing that the ſpirituall miniſters are bound to take as much diligence for him, as they be for any other of that Pariſh: wherefore it might ſtand with reaſon that hee ſhould be compelled to pay his tyths as his neighbors do, unleſs he can proue that he payeth in recompence thereof, more then the x. part in another thing. Nevertheleſſe I leave the matter to the iudgement of others, & then for a further proofe, though the ſaid preſcription of not paying tythes for trees of 20 year and above, were not good, yet that of corn and graſſe ſhould be good, ſome make this reaſon: they ſay that there is no tythe but it is either a predial tythe or a perſonal tythe, or a mixt tythe, and they ſay if a tythe ſhould bee paid of trees when theybe ſold that the tyth were not a predial tyth, for the predial tyths of trees is of ſuch trees as bringe forth fruits and encreaſe yearly, as apple trees, nut trees, pear trees, and ſuch other. Whereof the prediall tythe is the apples nuts peares, and ſuch other fruits as come to them yearly. and when the fruits be tythed, if the owner after ſell the trees, there is no tyth due thereby, for two tythes may not be paid of one thing, and of thoſe tyths that is to ſay, of predial tythes was the commandement given in the old law to the Iewes as appeareth Levit. 27. where it is ſaid, omnes decimæ terræ, ſive de pomis arborum ſive de frugibus, domini ſunt, & illi ſanctificãtur, that is to ſay, all tyths of the earth either of apples of trees or of grains, be our Lords, and to

him

him they be ſanctified, and though the ſaid law, ſpeaks only of apples, yet it is underſtood of all manner of fruits: And becauſe it ſaith that all the tythes of the earth be our Lords, therefore calves, lambs, and ſuch other muſt alſo be tythed, and they be called by ſome men predial tyths, that is to ſay, tythes that come of the ground, howbeit they call them only Predials mediate, and they be the ſame tyths that in this writting be called mixt tythes, and the other tythes (that is to ſay) tyths of apples and corn, and ſuch other be called Predials immediate, for they come immediately of the ground, and ſo do not mixt tiths, as evidently appeareth. Do. But what thinkeſt thou ſhall be the predial tyths of aſhes, elmes, ſallowes alders, and ſuch other trees, as bear no fruits, whereof any profit commeth, why ſhall not the 10. part of the ſelfe thing be the tythe thereof, if they be cut downe aſwell as it is of corne and graſſe? St. For I think that there is to that intent great diverſity betweene corne, graſſe, and trees, and that for divers conſiderations, whereof one is this: The property of corn and graſs is not to grow over one year and if it do, it will periſh and come to nought, and ſo the cutting downe of it is the perfection and preſervation thereof, and the ſpeciall cauſe that any increaſe followeth of the ſame: And therefore the tenth part of the increaſe ſhall be paid as a predial tythe, and there no deduction ſhall bee made for the charges of it: And ſo it is of ſheep and beaſts that muſt bee taken and killed in time, for elſe they may periſh and come to nought: but when trees be felled, that felling

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is not the perfection of the trees, ne it caufeth not them increafe, but to decay: For moft commonly the trees would be better if they might grow ſtill. And therefore upon that that is the cauſe of that decay and deſtruction of them, it ſeemeth there can no prædial tythe arife, ſome men ſay that this was the cauſe why our Lord in the ſaid Chapter of Levit. 27. gave no commandement to tythe the trees, but the fruits of the trees onely. &c. It appeareth in Paralip. 31. that the Jewes in the time of the King Ezechias offered in the Temple all things that the ground brought forth, and that was trees as well as Corne and graſſe. &c. It appeareth not that they did that by the commandement of God, and therefore it is like that they did it of their owne devotion, and of a favour that they had above their duty to the repairing of the Temple, which the King Ezechias had then commanded to be repaired: And ſo that text proveth nothing that tythe ſhould be paid for trees: And therefore they ſay farther that truth it is, that if a man to the intent he would pay no tythe, would wilfully ſuffer his Corne and graſſe to ſtand ſtill and to perish, he ſhould offend conſcience thereby: but though he ſuffer his trees to ſtand ſtill continually without felling, becauſe he thinketh a tythe would be aſked, if he felled them (ſo that he do it not of an evill will to the curate) he offendeth not in conſcience, ne he is not bound to reſtitution therefore as he ſhould be if it were of corne and graſſe, as before appeareth. And another diverſity is this: In this caſe of tythe wood, the

tythe thereof would serve so little to that purpose that tythes be paid for, that it is not likely that they that made the Law for payment of tythes, intended that any tythe should be payed for trees or wood: For the spirituall ministers must of necessity spend dayly and weekely, and therefore the tythe of trees or wood that commeth so seldome, would serve so little to the purpose that it should be paid for: that it would not helpe them in their necessity: So that if they should be driven to trust thereto, though it might helpe him in whose time it should happen to fall, yet it should deceive them that trusted to it in the meane time, and also should leave the Parish without any to minister to them. D. I would well agree that for trees that beare fruit there should no prediall tythe be paid when they be sold (for the prediall tythe of them is the fruits that come of them) and so there cannot be two predials of one thing, as thou hast said. But of other trees that beare no fruit, me thinketh that a prediall tythe should be paid when they be sold, and so it appeareth that there ought to be by the constitution provinciall made by the reverend Father in God Robert Winchelsie late Archbishop of Canterbury, where it is said, and declared, that Silva cedua is of every kind of trees that have being in that they should be cut, or that be able to be cut, whereof we will, saith he, that the possessour of the said woods be compelled by the censures of the Church to pay to the Parish Church, or mother Church, the tythe as a reall or prediall tythe: And so by vertue of that constitution

ſtitution prouincial a prædiall tyth muſt be paid of ſuch trees as haue no fruit: for I would well agree that the ſaid conſtitution prouinciall ſtretcheth not to trees that beare fruit, although the words be generall for all trees (as before appeareth) S. I take not the reaſon why a prædiall tithe ſhould not be paid for trees that beare fruit to be, becauſe two prædiall tythes cannot be paid for one thing: for when the tythe is paid of lambes, yet ſhall tythe be paid of woll of the ſame ſheepe (for it is paid for another increaſe) and ſo it may be ſaid that the fruit of a tree is one increaſe and the felling another: But I take the cauſe to be for the two cauſes before rehearſed, and alſo foraſmuch as the felling is not properly an increaſe of the trees but a deſtruction of the trees, as it is ſaid before And further I would heare thy mind upon the ſaid conſtitution prouinciall, which will, that tythe ſhould be paid for trees by the poſſeſſors of the wood, that if the poſſeſſor ſell the wood for C l. and giue the buyer a certaine time to fell it in, what tythe ſhall the poſſeſſor pay as long as the wood ſtandeth? Do. I thinke none, for the prædiall tythe commeth not till the wood be felled, and a perſonall Tythe he cannot pay, no more then if a man pluck downe his houſe and ſelleth it or if he ſell all his land, in which caſes I agree well he ſhall pay no tythe neither perſonall nor prædiall. S. And then I put caſe that the buyer ſelleth the wood againe as it is ſtanding upon the ground to another for CC l. what tythe ſhall be paid then? Doct. Then the firſt buyer ſhall pay tythe of the ſurpluſage that

he taketh ober the C. l. that he paied as a Personall tythe. Stu. And then if the second buyer after that cut it down and sell it when it is cut downe for lesse than he paid, what tythe shall then be paid?

D. Then shall he that selleth them pay the tyth for the trees as a predial tythe. S. I cannot see how that can be, for he neither hath the trees, that the prediall tythe should be paid for, if any ought to be paid, nor he is not possessor of the ground where the trees grow: And therefore if any prediall tythe should be paid, it should be paid either by the first possessor by reason of the words of the said constitution provinciall, which be, that the tythe shall be paid by the possessor of the wood, or by the last buyer, because he hath the trees that should be tythed, and by the first possessor the tythe cannot be paid as a prediall, for he cut them not downe, ne they were not cut downe upon his bargaine, and by the last buyer it cannot be paid neither as a prediall tythe, for the said constitution saith, that the possessor of the woods should be compelled to pay it. And therefore I suppose that the truth is, that in that case no tythe shall be paid, for as to the last seller, he shall pay no personall tythe: for he gained nothing, as it appeareth before, and no prediall tythe shall be paid, for it should be against the said prescription, and also the cutting down is the destruction of trees and not their preservation, as is said before.

D. Then takest thou the said constitution to be of small effect, as it seemeth. St. I take it to be

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of this effect, that of wood above twenty yeare it bindeth not, because it is contrary to the common law, and to the said prescription that standeth good in the common law; but of wood under xx yeare whereof tythe had been accustomed to be paid, the constitution is not against the said prescription, because paying of tythe under xx yeares is not prohibited, but suffered by the said statute: howbeit some say, that by the very rigour of the common Law tythes should not be paid for wood under xx yeare, no more then for above xx yeare, and the Prohibition in that case lyeth by the common law: Nevertheless, because it hath been suffered to the contrary, and that in many places tythe hath been paid thereof I passe it over, but where tythe hath not been paied of wood under xx. yeares, I think none ought to be paid at this day in law nor conscience: But admit that the said constitution hath effect for payment of the wood under xx. yeares as of a predial tythe, yet I cannot see how the tythe thereof should be paid by the possessor of the wood, if he sell them: but that it should be paid rather by him that hath the trees: for the constitution is, that the tythe shall be paid as a predial or predial tythe, and that is the tenth part of the same trees, as it is of corne. And if a man buy corne upon the ground, the buyer shall pay the tythe and not the seller: and so it should seeme to be here, and what the constitution meant to decree the contrary in tythe wood, I cannot tell unlesse the meaning were to induce the owners to pay Tythes of great trees when they sell them to their owne use:

which me thinketh should be very hard to stand with reason, though the said statute had never been made, as I have said before. And furthermore I would here (under correction) move one thing and that is this; That as it seemeth that they that were at the making of the said Constitution and knew the said prescription did not follow the direct order of charity therein so perfectly as they might have done: For when they made the said constitution provinciall directly against the said prescription, they set Law against Custome, and power against power, and in a manner the Spirituality against the Temporality, whereby they might well know that great variance and suit should follow, And therefore if they had clerely seene that the said prescription had been against conscience they should first have moved the King and his Councill and the Nobles of the Realm to have assented to the reformation of that prescription, and not to make a law as it were by authority & power against the Prescription, and then to threat the people and make them believe that they were all accursed that kept the said Prescription or that maintained it: & it seemeth to stand hardly with conscience to repose so many to stand accursed for following of the said statute and of the said prescription as there do, and yet to do no more than hath been done to bring them out of it. Do. Me thinketh that it is not convenient that lay men should argue the laws and the decrees or constitutions of the Church, and therefore it were better for them to give credence to spirituall rulers that have cure of their

soules then to trust to their owne opinions, and if they would do so, then such matter would much the more rather cesse then they will doe by such reasonings. S. In that that belongeth to the articles of the faith, I thinke the people be bound to beleeve the Church, for the Church gathered together in the holy Ghost cannot erre in such things as belong to the Catholique faith: But where the Church maketh any lawes whereby the goods or possessions of the people may be bound, or by this occasion or that may be taken from them, there the people may lawfully reason whether the Lawes binde them or not, for in such Lawes the Church may erre and be deceived, and deceive others, either for singularity, or for covetice, or some other cause: and for that consideration it pertaineth most to them that be learned in the law of the realme to know such lawes of the Church, as treat of the ordering of lands or goods and to see whether they may stand with the lawes of the realme or not; And therefore it is necessary for them to know the Lawes of the Church that treat of Wilmes, of Executors, of testaments, of Legacies, Wardy, Matrimony and divers other, wherein they be bound to know when the Law of the Church must be followed, and when the law o the realme; whereof because it is not our purpose to treat. I leave to speake any more at this time. and will resort againe to speake of Tythes, wherein some men say, that of Tinne, Coale and Lead no tythe should be paid when they be sold by the owner of the ground, because it is part of the inheritance,

and it is more rather a destruction of the inheritance then any encrease: And therefore they say that if a man take a Tinne worke, and give the Lord the tenth dish according to the Custome, that the Lord shall pay no tythe of that tenth dish neither prediall nor personall; but if the other that taketh the worke have gaines and advantage by the work, it seemeth that it were not against reason that he should pay a personall tythe of his gaines, the charge deducted. Do. I pray thee she w me first what thou takest for a personall tythe, and upon what ground personal tythes be paid as thou thinkest, so that one of us mistake not another therein. S. I will with good will: and therefore thou shalt understand that as I take it personall tythes be not paid for any increase of the ground, but for such profit as commeth by the labour or industry of the person, as by buying and selling, and such other, and such personall tythes, as I take it, must be ordered after the Custome, and the Church hath not used to levy those tythes of compulsion, but by conscience of the parties: Nevertheless Raimond saith, that it is good to pay personall tythes, or with the assent of the person, to distribute them to poor men, or else to pay a certaine portion for the whole. But as Innocent saith, where the custome is, that they should be paied, the people be bound to pay them as well as predials, the expences deduct. However in the Church of England they use to sue for such personall tythes as well as for predials, and that is by reason of the constitution provinciall, that was made by Robert Winchelsie

chelse: By the which it was ordained, that personall Tythes should be paid of crafts and Merchandise, and of the lucre of buying and selling, and in likewise of Carpenters, Smiths, Weavers, Masons, and all other of that worthe for hire, that they shall pay tythes of their hire except they will give any thing certaine to the ale, or the light of the Church, if it so please the Parson: And in another place the said Archbishop saith, that of the pawnage of Woods, and such other things, &c. and of fishings, trees, bees, doves, and of divers other things there remembred, and of crafts, and of buying and selling, and of the profits of divers other things there recited, every man should helpe satisfie competently in the Church, to the which they be bound to give it of right, no expences by the giving of the said Tythes deducted, or withholden: but onely for the payment of tythes of crafts and of buying and selling: And by reason of the said constitutions provincials, sometimes suites be taken in the Spirituall Court for personall tythes and thereof many men do marvaile, because deductions many times must be referred to the conscience of the parties. And they marvaile also why a law should be made in this realme for paying of personall tythes, more then there is in other Countries And here I would gladly move thee farther in one thing concerning such personall tythes, to know thy mind therin, and that is. If a man give to another a horse, and he selleth that horse for a certaine summe, shall he pay any tythe for that summe?

D. what

Do what thinkeſt thou the ſame? Sr. I think he that he ſhall pay no tythe: for there as I take it, the profit commeth not to him by his owne induſtry, but by the gift of another, and as I take it, perſonall tythes be not payed for every profit or advantage that commeth newly to a man, except it come by his owne induſtry or labour, and ſo it doth not here. And alſo if he ſhould pay tythe of that he ſold the houſe for, hee ſhould pay tythe for the very whole value of the thing. And as I take it, the perſonal tythes for buying and ſelling ſhall never be payed for the value of the thing, but for the cleere gaines of the thing: And therefore I take the caſes before rehearſed, where a man ſelleth his land, or pulleth downe a houſe, and ſelleth the ſtuffe, that he ſhould there pay no tythe, that it is there to be underſtood, that he hath not land or houſe by gift or by deſcent: For if a man buy land, or buy timber and ſtuffe of a houſe, and ſell it for againe, I ſuppoſe that he ſhould pay a perſonall tythe for that gaine. And this caſe is not like to a fee or annuity granted for counſell, where the whole fee ſhall be tythed for the charges deducted, or ſome certaine ſumme for it by agreement, for there the whole fee commeth for his counſell, which is by his owne induſtry. But in the other caſe it is not ſo, and the ſame reaſon as for the perſonall tythe might be made of trees, when they deſcend, or be given to any man, and he ſelleth them to another, that he ſhall pay no perſonall tythe. Doctor. Me thinketh that if the houſe amend in his keeping, and then he ſell the houſe, that then the tythe ſhall be paid

of

of that that the hoyle hath increased in value after the gift, and so it may be of trees, that he shall pay tythe of that that the trees may be amended after the gift or descent. &c. Then the tythe must be the x. part of the increase the expences deducted, and then of trees the charges must also be deducted, for it is then a Personall tythe, and there is no tree that is so much worth as it hath hurt the ground by the growing: therefore there can no Personall tythe be paid by the owner of the ground when he selleth them, though they have increased in his time Nevertheless I will speake no farther of that matter at this time, but will shew thee, that if Tin, Lead, Coale, or trees be sold that a mixt tythe cannot grow thereby; For a mixt tythe is properly of Calves, Lambes, Pigs, and such other that come part of the ground that they be fed of, and part of the keeping, industry, and oversight of the owners as it is said before: But Tin Lead, and Coale are part of the ground and of the freehold. & trees grow of themselves, and be also annexed to the freehold, and will grow of themselves: and also the mixt tythe must be paid yearly at certaine times appointed by the Law or by custome of the countrey, but it may happen that Tin, Lead, Coale, and trees shall not be felled or taken in many years, & so it seemeth it cannot be any mixt tyth, and these be some of the reasons, which they that would maintain that statute & prescription to be good, make to prove their intent as they thinke. Do what think they, if a man sell the lops of his wood, whether any tythe ought there to be paid?

S. They

St. They thinke all one law of the trees and of the lops. D. And if he vse to fell the lops one in xii. or xvi. yeares, what hold they then? St. That is all one. D. and what is the reason why Tythe ought not to be paied them aswell as for wood under xx. yeare? Stu. For they say, that the lops are to be taken of the same condition as the trees by what time sorder they be felled, and that no custome will serue in that case against the statute, no more than it should do of great trees D. And what hold they of the barke of the trees? Stu. Therein I have not heard of their opinion, but it seemeth to be one law of the lops. Doct. I perceive well by that thou hast said before, that thy mind is, that if a whole Country prescribe to be quit of Tythes of trees, some, and greatle, or of any other tythes, that that prescription is good, so that the spirituall ministers have sufficient bemde to live upon dost thou meane so? Stu. Yes verily. D. And then I would know thy mind, if any man contrary to that prescription were sued in the Spirituall Court for Corne and greatle, or any other Tythes, whether a Prohibition should lye in that case, as it did after thy mind before the said Statute where a man was sued in the Spirituall Court for Tythe wood.

St. I thinke nay. D. And why not there aswell as it did where a man was sued for the tythe wood? St. For as I take it, there is great diversitie betweene the cases, and that for this cause; There is a maxime in the Law of England, that if any suit be taken in the Spirituall

Court

Court whereby any goods or lands might be recovered, which after the grounds of the laws of the Realms ought not to be sued there, though percase the Kings Court shall hold no plea thereof, that yet a Prohibition should lye, and after that it had continued long that no Tythes were paid of wood, because of the said Prohibition, and that after by processe of time some Curats began to aske Tythes of woods, contrary to the Law, and contrary to the said prescription, so that variance began to rise betweene Curats and their Parishioners in that behalfe: then for appeasing the said variance the said Statute was made, and that as it seemeth more at the calling on of the Spirituality, than of the Temporalty; For the statute doth not expresly grant that the Prohibition in that case of tythe wood should lye so largely as some say it lay by the law: Howbeit, it doth not restraine the Common Law therein, as it appeareth evidently by the words of the Statute. and so after some men it appeareth before the statute, and also after the statute (as I have touched before) that the spirituall Court ought not in that case to have made any processe for Tythe wood: and therefore if they did, a Prohibition lay by the common law And like law is if the spirituall court make proces upon such a Legacy as by the Law of the Realme is void. As if a man bequeath to one, another mans horse, and the spiritual court thereupon maketh Processe to execute that Legacy, there a Prohibition lyeth: For it appeareth evidently in the libell, if all the truth appeareth in the libel, that

in

in the law of the Realme the legacy is void to all intents: And that he to whom the legacy is made, shall neither have the house nor the value of the house. And in like wise if a man sell his land for £ l. and he is sued after in the spirituall court for tythe of the said £ l. There a prohibition shall lye, for it appeareth in that case only in the libell that no tythe ought to be paid, and that the spirituall Law ought not in that case to make any processe whereby the goods of him that sold the land might be taken from him against the Law of the Realme. And upon this ground it is, that if a man were sued in the Spirituall Court, now sith the statute for a Mortuarie, that a Prohibition should lye for it appeareth in the libell, that sith the statute there ought no suit to be taken for Mortuaries: and the same law is, if any suit were taken in the Spirituall Court for a new duty that is of late taken in some places upon leases of Parsonages and Vicarages, which is called Dimission noble, for it appeareth evidently in the libell if any be made thereupon, that no such Processe ought by the law of the Realme to be made in that behalfe But in the case of Tythe corne or grasse, or such other things, wherein thou hast desired to know my mind, there appeareth nothing in the libell but that the suit thereof, of right appertaineth to the spirituall Law, and so for any thing that appeareth, the party may be holpen in the Spirituall Court by the prescription: and if the case were so far put that in the Spirituall Court they would not allow the said prescription, yet I thinke no

Pro-

Prohibition should lye: For though the spirituall Judges in the spirituall matter deny the partes of justice, yet the Kings Lawes cannot redresse that, but must remit to their conscience: But if there were some remedy provided in that case, it were well done: For some men say, that in the spirituall Court they will admit no plee against tythes. And also if a composition were made by assent of the Patron and also of the Ordinary between a Parson and one of his parishioners, that the Parson and his successors should have for a certaine ground so many quarters of corn for his tythe yearly, & after contrary to the composition of the Parson in the spirituall Court asked tythes as they fall, that in this case no Prohibition should lye, ne yet though the case were further put that the composition were pleaded in the Court and were disallowed, but all resteth in the conscience of the Judge spirituall (as is said before.) Howbeit, because some be of opinion that a Prohibition should lie in this last case, therefore I will refer it to the judgement of other: But in the case of prescription, before rehearsed, I take it for the cleerer case, that no prohibition should lye as I have said before And I beseech our Lord that this matter and such other like thereto may be so charitably looked upon, that there be not hereafter such divisions ne such diversities of opinions therin, as hath bin in time past, whereby hath followed great costs and charges to many persons in this Realme: And that hath moved me to speak so farre in this Chapter, and in divers other Chapters in this present

book

book as I have done: Not intending thereby to give occasion to any person to withhold his tythes that of right ought to be paid, nor to alter the portion therein before accustomed, but that (as me thinketh) they ought to be claimed by the said title as they ought to be payed, and by none other. And that it may also somewhat appeare that the said statute of 45. Ed. 3. was well and lawfully made, and upon a good reasonable consideration, and that the said prescription is good also, so that no man was in any danger of excommunication for the making of the said statute, nor yet is not for the observing thereof, nor yet of the said prescription, as it is noted by some persons that there should ber. And thus I commit thee unto our Lord, who ever have both thee and me in his blessed keeping everlastingly. Amen.

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